

No. 17762  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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PAUL JOHN CARBO, FRANK PALERMO, JOSEPH SICA,  
LOUIS TOM DRAGNA, AND TRUMAN K. GIBSON, JR.,  
*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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**APPELLEE'S BRIEF.**

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*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

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### I.

#### STATEMENT OF JURISDICTION.

Appellants were indicted by the Grand Jury in and for the Southern District of California, Central Division, on September 22, 1959, being variously charged thereby in ten counts alleging violations of Title 18, United States Code, Sections 1951, 371, and 875(b). [I C.T. 2-16.]†

All appellants were tried and convicted by a jury as charged in the foresaid indictment on May 30, 1961. [IV C.T. 951-960.] On December 2, 1961, all appellants were adjudged guilty upon their pleas of not guilty and the jury verdicts of guilty and they were sentenced as provided by law. [VI C.T. 1494-1500.]

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†C. T. signifies Clerk's Transcript which comprises ten volumes.

Timely notices of appeal were filed by each of the appellants from the several judgments of conviction of December 2, 1961. [VI C.T. 1515-1524, 1532-1533.]

The United States District Court for the Southern District of California had jurisdiction of the causes of action upon which the judgments appealed from were entered, pursuant to Title 18, United States Code, Section 3231.

This Court has jurisdiction to entertain these several appeals and to review the several judgments of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294(1).

## II.

### STATEMENT OF THE CASE.

The five appellants were indicted variously in a ten-count indictment by the Grand Jury for the Southern District of California, sitting at Los Angeles, on September 22, 1959. Carbo was charged in five counts alleging violations of 18 U. S. C. §§1951, 371, and 875(b); Palermo was charged in six counts alleging violations of 18 U. S. C. §§1951, 371, and 875(b); Sica was charged in three counts alleging violations of 18 U. S. C. §§1951 and 371; and Dragna and Gibson were each charged in two counts alleging violations of 18 U. S. C. §§1951 and 371. [I C.T. 2-16.]

Extensive pre-trial proceedings were had including the entertaining by the District Court (the Honorable Ernest Tolin, United States District Judge) of various motions by the five appellants. [See Clerk's Transcript generally from I C.T. 44 through II C.T. 472.]

The beginning of the trial was substantially delayed by the unsuccessful efforts of Carbo to obtain an or-



der quashing the writ of *habeas corpus ad prosequendum* issued by the District Court to Carbo's jailer in the City of New York.

*Carbo v. United States*, 277 F. 2d 433 (9 Cir. March 23, 1960), affirmed 364 U. S. 611 (January 9, 1961).

The trial commenced on February 21, 1961, at which time, on motion of appellee, the District Court (the Honorable Ernest Tolin) exonerated the bonds of the appellants Carbo, Palermo, Sica, and Dragna and remanded them into custody in order to avoid interference by them with the orderly process of the trial. (Appellant Gibson was briefly committed to custody at the same time; however, the order committing Gibson was vacated by the trial judge the day it was entered. [II C.T. 486-487.]) While the trial was in progress, Carbo, Palermo, Sica, and Dragna prosecuted two separate appeals in this Court seeking to obtain reinstatement of bail prior to conviction. In the first of these appeals, this Court held that the District Court possessed the inherent power to commit the appellants in order to maintain the orderly process of trial; however, this Court found that the brief record on the first day of trial did not justify the action of the District Court.

*Carbo v. United States*, 288 F. 2d 282 (9 Cir. March 3, 1961).

After additional evidence was adduced on the bail question in the District Court, the four incarcerated appellants were again denied bail by the trial court. This action was affirmed in this Court.

*Carbo v. United States*, 288 F. 2d 686 (9 Cir. March 15, 1961), *cert. den.* 365 U. S. 861 (March 27, 1961).

The trial concluded with the jury finding the five appellants guilty as charged in the indictment on May 30, 1961. [IV C.T. 951-960.]

After the verdicts were received, the District Court denied the pending motions for judgments of acquittal of appellants Carbo, Palermo, Sica, and Gibson and set hearing on all other motions, pending and to be filed, for June 20, 1961. [IV C.T. 950, 980.]

On June 11, 1961, Judge Tolin died. On June 26, 1961, Chief Judge Peirson M. Hall entered an order designating the Honorable George H. Boldt, United States District Judge for the Western District of Washington, to hear and dispose of any and all matters which remained to be disposed of in the case. [IV C.T. 1084.]

On July 24, 1961, Judge Boldt heard argument upon all pending post conviction motions and adjourned the case *sine die* for ruling thereon and for imposition of sentence (in the event the motions of the appellants were denied) in order to have an opportunity to acquaint himself fully with the entire record in the case. [See generally Volume 51 of the Reporter's Transcript of Proceedings, July 24, 1961.]

On October 13, 1961, Judge Boldt denied appellants' supplemental motions for new trial. [VI C.T. 1342-1344.]

On November 28, 1961, Judge Boldt signed a Memorandum Order setting forth his findings and tentative



ruling with respect to the pending motions of all appellants. This order invited all parties to submit further memoranda and oral argument if they so desired at or before the hearing on the motions, December 2, 1961. [VI C.T. 1446-1448.]

On December 2, 1961, Judge Boldt heard further argument upon the pending motions which were denied at the conclusion of argument. At this time, the District Court adopted the GOVERNMENT'S MEMORANDUM OF POINTS AND AUTHORITIES CONCERNING CERTAIN CONTENTIONS OF ERROR RAISED BY DEFENDANTS IN THEIR MOTIONS FOR NEW TRIAL "as being substantially and barring some possible suggestion of argumentation, a true analysis of the record" which conformed "entirely to my own views of it." [VI C.T. 1450-1490; 52 R.T. 8000-8001.]† In accordance with his Memorandum Order [VI C.T. 1447] and his remarks in open court on December 2, 1961 [52 R.T. 8002], Judge Boldt filed an Abstract of Testimony comprising ten volumes which summarized all of the trial proceedings. [VI C.T. 1565. See generally Volumes I-VI, Abstract of Testimony.]

On January 22, 1962, this Court denied the motions of appellants Carbo and Sica for bail pending appeal

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†R.T. signifies Reporter's Transcript of Proceedings which comprises fifty-two volumes.

without prejudice to renewal thereof after reconsideration of such motions in the District Court.

*Carbo v. United States*, 300 F. 2d 889 (9 Cir. January 22, 1962).

Upon reconsideration of his earlier denial of bail pending appeal, Judge Boldt again denied Carbo's and Sica's motions on February 5, 1962. [VI C.T. 1584.]

On February 13, 1962, this Court affirmed Judge Boldt's denial of bail pending appeal to Carbo and Sica.

*Carbo v. United States*, 302 F. 2d 456 (9 Cir. February 13, 1962).

On March 19, 1962, Mr. Justice Douglas denied bail to Carbo "in the public interest" and set bail for Sica in the amount of \$50,000 with substantial limitations upon his conduct while at large.

*Carbo v. United States*, 82 S. Ct. 662, 7 L. ed. 2d 769 (March 19, 1962);

*Sica v. United States*, 82 S. Ct. 669, 7 L. ed. 2d 778 (March 19, 1962).

The five appellants have filed seven interdependent opening and supplementary opening briefs on the merits of this case.

III.

STATUTES AND RULES INVOLVED.

Title 18, United States Code, Section 1951, provides in pertinent part as follows:

“(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

“(b) As used in this section—

\* \* \* \* \*

“(2) The term ‘extortion’ means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

“(3) The term ‘commerce’ means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.”

\* \* \* \* \*

Title 18, United States Code, Section 371, provides in pertinent part as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.”

\* \* \* \* \*

Title 18, United States Code, Section 875(b) provides as follows:

\* \* \* \* \*

“(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.”

\* \* \* \* \*

Rule 25 of the Federal Rules of Criminal Procedure provides as follows:

“If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satis-

fied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.”

Rule 30 of the Federal Rules of Criminal Procedure provides as follows:

“At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

#### IV.

### INTRODUCTION TO STATEMENT OF FACTS.

This is a direct evidence case, corroborated by compelling circumstantial evidence.

Four of the appellants voluntarily took the witness stand during presentation of the defense. Analysis of their testimony, without more, illustrates the operation of the conspiracy and establishes beyond cavil, the guilt of the appellants. Moreover, cross-examination of

the appellants elicited testimony showing similar acts and a common scheme and plan antedating the first overt act referred to in the indictment.

The indictment relates to attempts by the appellants to perpetuate their control of the welterweight championship. It was charged and proved that the appellants conspired to achieve this objective by the use of physical and economic threats against Jack Leonard, a promoter and matchmaker, and Donald Nesseth, manager of welterweight Don Jordan. At the outset, the threats were directed toward outright control of Jordan and, in the end, toward compelling Nesseth to agree to match his champion Jordan with Sugar Hart in a title fight.

The position of appellant Truman K. Gibson, Jr., is crucial in the structure of the conspiracy. Gibson, an attorney and member of the bar of the State of Illinois, first became directly involved with professional boxing in 1949. Prior to that year, Gibson's connection with boxing stemmed from his professional representation of heavyweight champion Joe Louis. [32 R.T. 4707-4710.] In 1949, Louis, in the twilight of his career, was anxious to retire, but in doing so, wanted to capitalize on his national prominence and bow out with some assurance of continuing profits predicated upon his long tenure as heavyweight champion of the world. Consequently, Gibson conceived a plan the object of which was to control the heavyweight championship through a business organization known as Joe Louis Enterprises. [32 R.T. 4707-4710.]

An appreciation of what transpired prior to October, 1958, requires an understanding of what motivated the



appellants' conduct in this case. This "mens rea" element was established, particularly in the direct and cross-examination of defense witnesses, including four of the appellants, demonstrating that "control" of champions and top contenders was the only significant profit factor in the operation of the boxing business. The evidence shows that "control" was effected and maintained through matching controlled fighters with one another and that the technique for obtaining this control was to capture the fight manager through use of economic and, as a last resort, physical coercion.

This case demonstrates the operation of both techniques, and, as the appellant Palermo himself acknowledged on the witness stand, ". . . *We have been doing this for years. This is the first time this kind of case ever came about.*" [40 R.T. 5985.]

Appellee respectfully requests the Court, in analyzing the evidence, to take note of the divergent backgrounds of the appellant Gibson on the one hand, and the appellants Carbo, Palermo, Sica and Dragna on the other. Gibson was a highly educated and resourceful member of the bar and, *according to Gibson's Opening Brief* [Gibson Op. Br. 6 ](although not proven during the trial), a community leader, experienced in political affairs and government and highly skilled in the art of persuasion. The other appellants, particularly Carbo and Palermo, were furtive and sinister in the day-to-day conduct of their business affairs. They were without offices or roots in any community in this country and employed crude methods in their acquisition of money and economic power in boxing. The ends of both groups were the same, although the casual observer

would conclude that, despite agreement on ends, they could never agree upon means. Yet this is what happened, and this is what was proven in this classic criminal case now before the bar of this Honorable Court.

The execution of the conspiracy charged in the indictment was facilitated by the business policies of the International Boxing Clubs of which Gibson was at all times the operating head. It was conclusively proven that Gibson used Carbo and Palermo in the operation of his business and, conversely, it was shown that Carbo and Palermo used Gibson and the I.B.C. in *their* extortive activity. [34 R.T. 5050; 35 R.T. 5127, 5130-5136, 5138.]

It is in this frame of reference that Leonard Blakely, referred to herein as Jack Leonard (under which name he had fought professionally), and Donald Nesseth, manager of welterweight Don Jordan, became victims of the conspirators.

During the period October 23, 1958, to September 22, 1959, Nesseth and Leonard were subjected to mental torment and abuse resulting from repeated economic and physical threats. When the pressures became intolerable the terrorized victims were afforded relief and protection through the intercession of the police and the Federal Bureau of Investigation, from whom they had requested aid.

Although appellee refers to this as "a classic case", it is the Government's contention that there are no unique principles of law involved. The case is unique and "classic" only because it is not a vicarious prosecution. Unlike most prosecutions involving organized



crime, this prosecution attacked the organized criminal activity itself rather than the collateral conduct of the participants for income tax evasion, contempt, or perjury.

It should be emphasized in conjunction with these prefatory remarks that the evidence about events which predate the first overt act alleged in the indictment is in the record because the appellants chose to call witnesses, who had been closely associated with them. Also, because appellants Gibson, Palermo, Sica and Dragna testified in their own defense and clearly revealed the common scheme and plan which provided the framework for their joint criminal activity.

## V.

### STATEMENT OF FACTS.

#### A. The Years 1950 to 1957—The Period of Indifference.

In 1949, appellant Truman K. Gibson, Jr., persuaded the Norris-Wirtz business interests in Chicago of the efficacy of his plan [32 R.T. 4706-4709] to use an existing corporate entity, Joe Louis Enterprises, as a basis for a new type of operation which would match top contenders in elimination bouts for the heavyweight crown of retiring Joe Louis. [32 R.T. 4707-4710.]

It was part of this arrangement that the contenders: Ezzard Charles, Lee Savold, Gus Lesnevich, and Joe Walcott, would sign exclusive contracts with Joe Louis Enterprises. [32 R.T. 4710.] Subsequently, these exclusive contracts were to be assigned to the newly formed International Boxing Club of Illinois which was to operate in conjunction with the established Chicago

Stadium Corporation. Shortly thereafter, the International Boxing Club of New York was formed and operated with the Madison Square Garden Corporation. [32 R.T. 4711-4712.]

When Gibson sought out the Norris-Wirtz group with his project, the latter already owned the Chicago Stadium, the Detroit Olympia, and the St. Louis Arena. [32 R.T. 4705-4707.] After the International Boxing Club of New York was formed, it obtained the exclusive right to promote prize fights in Madison Square Garden. [32 R.T. 4712.] By 1950, the Twentieth Century Sporting Club had gone out of existence due to Mike Jacobs' heart attack. [32 R.T. 4712-4714.] Consequently, the International Boxing Club of New York and the International Boxing Club of Illinois were on the scene as powerful promotional organizations with exclusive access to the large boxing arenas in four principal American cities: New York, Chicago, Detroit, and St. Louis. Although appearing to be separate corporate entities, I.B.C. of N.Y. and I.B.C. of Ill. were operated by the same officers [32 R.T. 4718] and they followed a practice of negotiating exclusive service contracts with world champions. [32 R.T. 4724-4726.]

The practice of acquiring exclusive service contracts continued until some time after the decision of United States District Judge Sylvester Ryan in March, 1957, in *United States of America v. International Boxing Clubs* [32 R.T. 4724-4726; 150 F. Supp. 397] which was subsequently affirmed by the United States Supreme Court in *International Boxing Clubs v. United States of America*, 358 U. S. 242 (1959). Gibson acknowledged on the witness stand that it was one of

Judge Ryan's findings, concurred in by the Supreme Court of the United States, that a purpose of the International Boxing Clubs of New York and Illinois was to require a *contender* to sign an exclusive service contract before he could obtain a title fight. [32 R.T. 4725.] Gibson testified that every heavyweight champion since Joe Louis had an exclusive service arrangement with the International Boxing Clubs, until Judge Ryan's decree and the Supreme Court's affirmance compelled termination of that practice. [32 R.T. 4702-4703.] As a consequence of this "business practice", top contenders either fought for I.B.C or did not get a title fight at all. Thus, I.B.C and Gibson took credit for Nesseth's fighter, Don Jordan, becoming the number one contender and, according to Gibson, they arranged it. [32 R.T. 4704.]

Gibson's first contact with the appellant Carbo came shortly after I.B.C. was organized sometime in 1950. [30 R.T. 4516-4517; 32 R.T. 4755-4757.] And their relationship became sufficiently congenial and personal for Carbo to telephone his congratulations to Gibson eight years later when Gibson was elected President of I.B.C. [30 R.T. 4517.] Gibson quibbled over the true character of his relationship with Carbo and endeavored to draw a distinction between "knowing" Carbo and "meeting" Carbo. In any event, Gibson "met" with Carbo on occasion during the period 1950 through 1958, and engaged in telephone conversations with him. [32 R.T. 4755-4757.]

Documentary evidence establishes that at least during the period 1954 to 1957 a more formal relationship existed between the organization operated by Gibson and the interests represented by Carbo. This relationship

is memorialized in the books of the Nevill Advertising Agency, also a Norris-Wirtz enterprise [32 R.T. 4759-4763], which obtained its funds from another Norris-Wirtz enterprise known as Telradio which, in turn, was the contracting party (in lieu of I.B.C. of Illinois) for the weekly Wednesday night telecast by the American Broadcasting Company network. [32 R.T. 4728.]

In the effort to conceal any connection between the I.B.C. organization and Carbo, payments to Carbo were made in the maiden name of Carbo's wife, Viola Masters. Gibson had obtained the statistical information from this I.B.C. "employee" which was essential to formalize "salary" payments to her. At the time this testimony was given, Viola Masters Carbo was seated in the first row of the courtroom behind the defense table and Gibson identified her as the person he had interviewed in Chicago prior to the first payment in 1954. [32 R.T. 4763-4766.] The employment relationship was itself fictitious, although Gibson endeavored to justify it with the explanation that it was for the "orderly presentation of unfixed fights on television." Norris and Gibson had discussed this and decided to make the payments so as not to "antagonize or alienate" any of the fighters or managers with whom Carbo had "influence". Consequently, Carbo was paid until 1957, the year of the District Court decree referred to above. [32 R.T. 4765-4766.] In substance, Gibson testified that this was necessary to assure the business success of the I.B.C.

Approximately \$40,000 was paid to Carbo in this fashion and Gibson acknowledged it was for Carbo's good will. [32 R.T. 4767-4769.] When pressed for an explanation before the United States Senate of why the

I.B.C. hired Mrs. Carbo instead of Carbo himself, Gibson had said it was, "Because it looked a little bit better on our records, not ever considering the possibility of being called before a Senate investigative committee, to have Viola Masters down instead of Frank Carbo." [32 R.T. 4769-4770.] That Gibson knew the payments were made for the benefit of Carbo is uncontroverted and it is admitted that he knew from the outset that the "Viola Masters" he was putting on the books was Mrs. Frank Carbo. She had been introduced to him as Mrs. Frank Carbo. [32 R.T. 4771-4773.] Although, at trial, Gibson endeavored to place the responsibility for the payments upon James Norris, he had already acknowledged to the United States Senate that he, Gibson, had made the payments or caused them to be made. [32 R.T. 4771-4773.]

During this period 1950 to 1957, many of the persons who were called as defense witnesses were in contact with the appellants Gibson, Carbo and Palermo. In 1956, Bernard Glickman, for example, purported manager of Virgil Akins, later to be welterweight champion, "loaned" \$10,000 in cash to Carbo. The money was called for by an unknown messenger named "Mike." [Referred to below. 29 R.T. 4270-4271.] Glickman testified, on cross-examination, that he had simply handed \$10,000 in cash to Carbo's messenger and had not obtained any evidence or token of the debt in exchange therefor.

Palermo, too, was on the receiving end of substantial payments of money in connection with his relationship to the appellant Gibson. [See Section C, below.]

On March 8, 1957, the United States District Court for the Southern District of New York rendered its



decision in *United States of America v. International Boxing Clubs* [150 F. Supp. 397] and held that the defendants in that case were violating the federal anti-trust laws and that monopoly practices therein referred to must be discontinued. Separation of the International Boxing Club of New York and the International Boxing Club of Illinois was decreed, and the defendants therein were ordered to discontinue the practice of requiring exclusive service contracts as a condition to their negotiations with fighters and in the promotion of nationally televised championship fights. [32 R.T. 4718, 4720, 4725.] This led to the second phase of activity which is discussed in the following section.

**B. March, 1957, to October, 1958—The Agonizing Reappraisal and Emergence of the Conspiracy.**

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*Preface*

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During the eighteen-month period between the District Court decree in New York and the commission of the first overt act against the victims in the instant case, Gibson, as operating head of the I.B.C., endeavored to adjust to the new situation. The evidence adduced at trial disclosed that this adjustment included: (1) an effort to extend I.B.C. jurisdiction to the West Coast in the guise of the Hollywood Boxing and Wrestling Club; and (2) a closer working alliance with the underworld, mainly Carbo and Palermo, as a result of the banning of exclusive service contracts.

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During January of 1958, appellants Carbo and Gibson met in the Roosevelt Hotel in New York. Their

discussions included the subject of the forthcoming elimination fight between Logart and Akins for the welterweight title (the object of control in the instant case when Jordan became welterweight champion.) Gibson had acknowledged before the United States Senate that Carbo's activities in connection with that fight had cost his organization between \$10,000 and \$15,000. At the trial, Gibson admitted he had so testified but insisted that he was merely "stating a conclusion that was passed on" by others in the I.B.C. [32 R.T. 4773-4776.] Gibson did admit that he told Carbo that he "wanted to see Akins involved in a championship fight" and that Carbo replied, "[W]ell, it is O.K., fine." [32 R.T. 4758.]

Toward the middle of 1958, Gibson was advised by his Friday night sponsor, the Gillette Company, of its desire for a championship fight on television to launch its father-son Christmas selling campaign. This was important to Gillette and consequently Gibson told Bernard Glickman, manager of Akins, to keep his welterweight champion available. [32 R.T. 4779-4782.] Gibson had testified before the United States Senate that Glickman was a Carbo-controlled manager and that, "I could go a little further with Glickman because of his own statements. He has said that he did consult with Carbo in the managing of matches. . . ." [32 R.T. 4777-4778.] At the trial, however, Gibson insisted that these statements had not been made to him personally but had appeared in the public press. [32 R.T. 4778.]

In January of 1957, Gibson had brought Jack Leonard to see Carbo at a night club in New York which was owned by one of Kid Gavilan's managers,

Angel Lopez. [5 R.T. 609-611.] Leonard had first met Carbo in Chicago in 1956 when he was introduced to Carbo by unindicted co-conspirator William Daly on the occasion of the Patterson-Moore fight. At that time, Leonard was the matchmaker for Hollywood Post 43 of the American Legion at the Hollywood Legion Stadium. [5 R.T. 608-609.] On the occasion of Gibson's taking Leonard to see Carbo in New York, he told Leonard that "he didn't like to deal with people like Mr. Carbo" but if Leonard wanted to be successful in business, he would have to get to know Carbo, that this would be better for Leonard's business. Gibson and Leonard were accompanied by Lester Malitz, another defense witness. [5 R.T. 609-611; 34 R.T. 5021-5023.]

In February of 1958, Chris Dundee, a defense witness, and promoter in Miami, Florida, telephoned Gibson concerning closed circuit television rights to the Basilio-Robinson fight. In the course of the conversation, Dundee, in accordance with Carbo's practice [see Section C, below], put Carbo on the telephone. After his talk with Carbo, Gibson testified that he said to Dundee, "Chris, what the hell do you mean trying to put *pressure on us* this way." [33 R.T. 4942, Emphasis supplied.]

During this period Carbo himself was extremely active in matters involving professional boxing and in which, according to the evidence, he had no legitimate concern. On March 19, 1958, Carbo, Palermo, and others were attending a party at Goldie Ahern's Restaurant in Washington, D. C. Carbo told Palermo to telephone Jackson 2-9456 in Houston, Texas, listed to Lou Viscusi, manager of lightweight champion Joe Brown.



Palermo made the telephone call from a public telephone and returned to Carbo's table where he reported to Carbo that he had demanded \$2,000 right away and that he had frightened the person who was on the telephone. Palermo added that he had been told by the recipient of the call that the latter did not have any money and Palermo bragged that he had told him to "look in the drawers, you know where to find it." Carbo then, following a practice referred to herein in connection with death threats to Leonard [see Section C, below], followed Palermo to the telephone where he proceeded to engage in conversation. [15 R.T. 2258; 37 R.T. 5458-5461, 5481; 16 R.T. 2328-2331; 33 R.T. 4943-4946; Exs. 100-102, 176, 101-A for Ident. at p. 11.]

Carbo also reassured Palermo during the party at Goldie Ahern's that he had talked to the aforementioned Bernard Glickman, manager of Akins, that a particular fighter was Carbo's, and that Palermo should not worry about the subject. [43 R.T. 6524-6525.]

Only two days later, on March 21, 1958, at the Hampshire House in New York City, Carbo and Palermo were together with the same Bernard Glickman on the occasion of the Logart-Akins fight which Akins won, thereby enabling him to fight Martinez for the title 2½ months later. [40 R.T. 6073-6074; 18 R.T. 2630.]

Four days later, on March 25, 1958, Jack Leonard was in Chicago for the Basilio-Robinson fight. James D. Norris (of the Norris-Wirtz interests referred to above) told Leonard that Carbo wanted to see him. Leonard asked Gibson where Carbo was and Gibson told

him he would find out and that Leonard would get a telephone call. Shortly thereafter Leonard received a call from Al Weill who escorted Leonard to the Palmer House Hotel where Leonard testified, "They held trial for me more or less." The "trial" took place because Leonard, in Carbo's judgment, was not giving Weill's fighters enough activity on the West Coast. [12 R.T. 1669-1673.] Weill is described by unindicted co-conspirator Daly as a Carbo associate "who pays off like a . . . slot machine." [Exs. 100-102, 176, 101-A for Ident. at pp. 14-16.]

In April of 1958, Carbo telephoned Gibson and congratulated him upon his election as President of I.B.C. [30 R.T. 4517.]

It was during the summer of 1958 that Gibson attempted to extend I.B.C. influence to the West Coast. In August, Gibson and George Parnassus, co-promoter with Cal and Aileen Eaton, and matchmaker at the Olympic Auditorium, met at the Hollywood Roosevelt Hotel in Los Angeles. [27 R.T. 3971.] Their discussions concerned leasing of the Hollywood Legion Stadium from Hollywood Post 43 of the American Legion which was anxious to get out of the boxing business. The Hollywood Legion Stadium and the Olympic Auditorium were the only two exhibition halls for the staging of boxing contests in Los Angeles. Control of both would eliminate any competitive element in boxing in Los Angeles. [22 R.T. 3155, 3164; 23 R.T. 3307-3308; 27 R.T. 3974; 29 R.T. 4322; 24 R.T. 3474-3477, 3515, 3529-3537; 25 R.T. 3609-3619.]

At this time Jack Leonard was employed by Hollywood Post 43 as matchmaker at the Hollywood Legion Stadium. [5 R.T. 585.] Victim Donald Nesseth was a

salesman with the part-time occupation of managing a young welterweight named Don Jordan. Gibson, of course, was in charge of promoting weekly the two nationally televised boxing shows, one on Wednesday night over the A.B.C. network, and the other on Friday night over the N.B.C. network. It was costly for the sponsors to produce these shows; at least \$180,000 per week was received by the I.B.C. in connection with these promotions. [29 R.T. 4306-4309.]

Prior to September 30, 1958, and after the meeting at the Hollywood Roosevelt Hotel in Los Angeles, Gibson and Parnassus were in Portland, Oregon, at which time they telephoned unindicted co-conspirator William Daly. [29 R.T. 4322; 23 R.T. 3307-3308; 27 R.T. 3974.] The reason for the call to Daly, who was in New Jersey, was that he was friendly and influential with Edward Underwood who ran the Legion's boxing operation. It was felt that Daly could persuade Underwood to lease to the I.B.C. interests rather than to an organization known as Skiatron which was offering \$60,000 rent and intended to take over television promotion of Wednesday night fights on the A.B.C. network. [24 R.T. 3534-3536; 27 R.T. 3974; Ex. Z; 29 R.T. 4322; 22 R.T. 3158-3159, 3172, 3174-3176.] Moreover, Daly had been close to Underwood at a time when Underwood was endeavoring to terminate a strike of fight managers which was interfering with the operations of the Legion Stadium. [21 R.T. 3071-3073.] Sometime later Underwood sent an emissary to the East to talk with Carbo. This mission concerned difficulties that the Hollywood Legion Stadium was having in scheduling of boxing contests and had some relation to allegedly "unfavorable testimony in some Federal trial concerning people in the boxing game." [26 R.T.

3723-3724, line 11; 3727, line 19-3728; 3733, line 7-line 12.]

It is established that at this time unindicated co-conspirator William Daly was close to Carbo, and Daly's participation in these matters with Parnassus and Gibson makes it clear that in the event the Gibson-Parnassus plan was successful, the Los Angeles fight picture would be dominated by Gibson's I.B.C. and by Carbo. [See generally Exs. 100-102, 176, 101-A for Ident. and Reporter's Transcript citations set forth above.]

It was decided that the new boxing club, to be known as the Hollywood Boxing and Wrestling Club, would issue five shares of stock nominally to Jack Leonard. In fact, however, Leonard would pledge back the five shares as security for a loan of \$28,000 from I.B.C. and \$10,000 from George Parnassus. If and when the loans were paid off, the stock would be returned as follows: one share to appellant Truman Gibson; one share to unindicted co-conspirator William Daly; one share to James D. Norris; one share to George Parnassus; and one share to Jack Leonard. In no event was Leonard to have more than a 20% interest. Although Leonard was to be named promoter, matchmaker, and President of the Club, Parnassus was to have over-all supervision and control of the matchmaking and promotion activities of the new club. No large checks were to be drawn without Gibson's consent, and disbursement of funds in any event was removed from Leonard's jurisdiction. Leonard was a mere front in the operation of the new club. A letter dated October 28, 1958, from Truman Gibson to George Parnassus, is an apt illustration of this fact. [28 R.T. 4181-4183.]

On September 30, 1958, Gibson, Daly, Parnassus, Underwood and Leonard, met at a hotel in San Francisco. Their purpose was to procure approval of the California State Athletic Commission for the new operation. Two meetings occurred the same day: the first between the above named persons; the second meeting was with the Chief Enforcement Officer of the State Athletic Commission, Jack Urch. Daly was significantly absent. [21 R.T. 3083-3084; 28 R.T. 4139-4140; 29 R.T. 4327-4328.] Daly's interest in the new club was never disclosed to the Commission nor were the true facts concerning control of the club revealed. The impression was conveyed that Leonard was to be in active control of the Hollywood Boxing and Wrestling Club and it was on this premise that the Commission approved the new arrangement. [25 R.T. 3694-3695; 21 R.T. 3080-3082; 28 R.T. 4181-4183; 29 R.T. 4321-4322.]

As Underwood explained, this was necessary in order to obtain approval from Urch and the State Athletic Commission, in order that Gibson, or a club financed by Gibson, could take over. [25 R.T. 3619.]

The date of the first overt act alleged in the indictment is October 23, 1958, the day after the second Jordan-Ortega welterweight title elimination match. By this date the I.B.C., of which Gibson was operating head, was committed to a policy of using the underworld in the operation of its business. [34 R.T. 5050.] Gibson explained that his purpose in using the underworld to the extent that he could was "to put on fights that would please our sponsors and the public, and fights that were not fixed, in that the results were not predetermined before the fight took place." [35 R.T.



5127.] Gibson said they would use “everyone” they could to prevent fixed fights [35 R.T. 5127] and that by “everyone” he included the underworld. [35 R.T. 5130-5136.] Gibson further acknowledged when he appeared before the United States Senate that he testified that there were other reasons for his use of the underworld, to wit, “to maintain a free flow of fighters without interference, without strikes, without sudden illnesses, without sudden postponements.” [35 R.T. 5135.] At the trial he was asked about this as follows:

“Q. (By Mr. Goldstein): So that you were using the underworld in all these respects in anticipation of trouble and not because of any actual trouble, is that so? A. That is not correct. We didn’t anticipate the problems. We looked into the future to see what problems might arise and we took what we considered to be adequate steps to safeguard our business.

Q. And those adequate steps included the use of the underworld, is that so? A. Quite incidentally.” [35 R.T. 5136.]

In an effort to show that this policy was a harmless one, unconnected with the charges in this case, Gibson’s counsel, on redirect, asked the appellant whether it was “the policy of the International Boxing Club or any other organization with which you were connected in the fight business to use force or violence or threats of force and violence. . . .” To which Gibson replied: “No, indeed.” [35 R.T. 5138.]

On recross-examination of Gibson, the subject of his use of the underworld was finally concluded as follows:



“Q. Of course, Mr. Gibson, when you used various people to achieve your ends you didn’t know what those other people were doing on your behalf, did you? A. Not completely, no.” [35 R.T. 5138.]

**C. The Conspiracy Emerges: October 22, 1958—  
Indictment, September 22, 1959.**

On the night of October 22, 1958, Don Jordan defeated Gaspar Ortega in a twelve round elimination bout, the winner of which was to fight welterweight champion Virgil Akins for his title. [5 R.T. 588-589.] Jordan had been managed by Donald Paul Nesseth since March, 1957. Nesseth, a used car dealer, had held a California manager’s license almost continuously since 1950. [12 R.T. 1742-1743.] After a number of bouts, Jordan became a “ranked” fighter in July, 1958, that is to say, he was listed by either Ring Magazine or the National Boxing Association as one of the top ten welterweight boxers of the world. [12 R.T. 1744.]

Jack Leonard had been connected with professional boxing since 1939 in the several capacities of professional boxer, manager, assistant matchmaker, matchmaker, and promoter. From 1955 until November 1, 1958, Leonard was the boxing matchmaker at the Hollywood Legion Stadium. [5 R.T. 585-586.] Under the agreement negotiated in San Francisco the previous month, Leonard became the “President” of the Hollywood Boxing and Wrestling Club. The Club obtained a lease to the Hollywood Legion Stadium financed by \$28,000 provided by Gibson’s I.B.C. [5 R.T. 612-615; 25 R.T. 3622.]

In the months preceding the Jordan-Ortega fight, Nesseth had been making repeated efforts to obtain fights for Jordan on national television, since televised bouts were virtually the only route to boxing prominence. These efforts included daily visits to Leonard's office at the Legion Stadium where he would prevail upon Leonard to try to arrange televised fights for Jordan. [12 R.T. 1746-1749.] Acting as an intermediary between Gibson and Nesseth, Leonard arranged a nationally televised bout at the Legion Stadium in July, 1958, between Jordan and Isaac Logart, then ranked as the number one contender for the welterweight title. The International Boxing Club co-promoted the fight with Hollywood Post 43. Jordan won the fight and rose on the rank list to the number six contender for the title. Jordan next defeated Lahouri Godih in a televised match at Madison Square Garden. [12 R.T. 1747-1752.] Jordan's victory over Logart advanced Gaspar Ortega to the position of number one welterweight contender. In September of 1958, Jordan fought and defeated Ortega in a match televised from Portland, Oregon, and co-promoted by the I.B.C. When Nesseth was promised that the winner of a rematch between Jordan and Ortega would fight Akins for the title, he agreed to the fight. [see Section B, above, for discussion of Glickman's promise to Gibson concerning defense of Akins' title on December 5, 1958.] Jordan won the bout on October 22, 1958, and became the number one contender. This match was promoted by George Parnassus and the Olympic Auditorium of Los Angeles. [12 R.T. 1752-1756.]

Prior to the Jordan-Ortega rematch on October 22, Gibson had assured Nesseth that Akins had signed a

contract to defend his title against the winner of that bout. [12 R.T. 1756; 30 R.T. 4454, 4472.] However, the contract filed with the California State Athletic Commission reflects that Akins did not sign the contract until October 28, 1958, six days after the Jordan-Ortega rematch. [28 R.T. 3771-3772; Exs. Z-29, G.]

On the morning of October 23, 1958, Nesseth went to the Olympic Auditorium to confer with Gibson about the impending championship fight between Jordan and Akins and to receive his payment from George Parnassus for the second Jordan-Ortega fight. Leonard and Warren Wayland Spaw were also present in Parnassus' office. [5 R.T. 592, 594-598; 12 R.T. 1756-1757; 14 R.T. 2057-2058.] Spaw, known professionally as Jackie McCoy, was assistant matchmaker at the Hollywood Legion Stadium and a former partner of Nesseth in a used car business. On becoming Leonard's assistant, McCoy had released his boxing management contracts with several boxers to Nesseth with the understanding that he could become a partner with Nesseth in their management if he desired to do so in the future. [14 R.T. 2055-2058.]

Leonard had come to Parnassus' office with Nesseth at the telephonic request of Gibson to discuss the Jordan-Akins fight. [5 R.T. 592, 594-598; Ex. 86-E.] Leonard requested Gibson to give the promotion of the Jordan-Akins bout on December 5, 1958, to the Hollywood Boxing and Wrestling Club, but Gibson refused, replying that Parnassus' Olympic Auditorium would promote the televised fight and if profits resulted, part would go to the Legion Club. [5 R.T. 598-599.]

Leonard had made numerous efforts to arrange televised fights for Jordan. He had no management in-

terest in Jordan but was a very close friend of Nesseseth. [5 R.T. 621-622.]

Before leaving his suite at the Ambassador Hotel that morning, and after telephoning Leonard at his home in Northridge, Gibson had made a one minute telephone call to his office in Chicago at the Chicago Stadium followed by a six minute call to Palermo at the Bismarck Hotel in Chicago. [5 R.T. 592; 30 R.T. 4456-4461; Exs. 86-D, 86-C.] Gibson told Parnassus that he had spoken to Glickman the preceding night and he anticipated some problems, but that the plans for the title fight should proceed. [30 R.T. 4454.] While Gibson, Nesseseth, and Leonard were discussing the December 5th fight in Parnassus' office, the telephone rang and Gibson was called to the telephone by someone in the office. Gibson spoke briefly with the party on the line and then turned to Leonard and told him that "Blinky" wanted to speak with him. Leonard picked up the receiver. The caller was appellant Palermo. [5 R.T. 599-600; 30 R.T. 4455-4456.]

Leonard testified to this first extortive demand as follows:

"I took the phone and said, 'Hello.'

He said, 'Hello, Jackie?'

I said, 'Yes.'

He said, 'Do you know we are in for half?'

I said, 'Half of what?' I said, 'I don't know what you are talking about.'

He said, 'We are in for half the fighter or there won't be any fight.'

I said, 'This is the first I have heard of it. I don't know what you are talking about.'

He said, 'Didn't Truman explain everything to you?'

I said, 'No. This is the first time I ever heard anything about it.'

He said, 'Well, there won't be any fight unless we are in for half.' He said, 'You better talk to Mr. Gibson and get back to me.'

I said, 'That is what I will have to do. I don't know anything about it. This is the first time I heard of it.'

And he says, 'Well, I am at the Bismarck Hotel in Chicago.' And he says, 'You go talk to Truman and call me back,' and with that he hung up." [5 R.T. 601-602.]

Palermo also told Leonard that he had told Gibson the day before in Chicago that " 'there was no fight unless they O.K.'d the terms out there that we get half.' " [6 R.T. 840.] Palermo later admitted he had made this statement to Gibson in Chicago prior to calling Leonard. [Exs. 97, 96-A for Ident. at p. 53.]

Leonard testified that the following ensued after he hung up the receiver:

"Well, I got hold of Mr. Gibson and Don Nesseth and we went into the hallway just outside of Mr. Parnassus' office, and I told him what Mr. Palermo had told me, and right away Mr. Nesseth said, 'There won't be any of that.'

And Truman said, 'Well, gee, I am sorry.' He said, 'I should have told you, but' he said, 'I had so many things on my mind, pressing my mind, I forgot to.' He said, 'We better not discuss this here.' He said 'I don't want George Parnassus to



know about it.' He said, 'Meet me at the Ambassador in a few minutes and we will go on further with the discussion.'” [5 R.T. 602; 12 R.T. 1757-1758.]

That afternoon Leonard, Nesseth and McCoy met Gibson at his Ambassador Hotel bungalow suite to discuss the telephonic demand by Palermo. McCoy was present for a part of the discussion. Nesseth and Leonard informed Gibson that Nesseth was not going to give away part of his management interest in Jordan's contract after Nesseth had worked so hard to obtain a title fight for Jordan. [5 R.T. 603; 12 R.T. 1760.]

Gibson told them he had learned in Chicago that Carbo and Palermo controlled Akins. [5 R.T. 629; Exs. 97, 96-A for Ident. at pp. 53, 56.] Then he said:

“... ‘You know how Carbo and Blinky are. . . . They want all of everything before you can get a welterweight title fight. . . . You should go along with this thing and I will straighten it out when I get back to Chicago. . . . I am going back tomorrow and straighten this thing out.’” [5 R.T. 603; 12 R.T. 1760; 14 R.T. 2061-2062.]

Gibson told Nesseth that he had better tell Carbo and Palermo that he agreed to their terms, pending Gibson's return to Chicago where he would “straighten everything out”, because it was very important to him (Gibson) that this title fight take place on December 5th. [32 R.T. 4780-4781.] The Christmas sales campaign for the television sponsor, Gillette, depended upon the televising of that fight on schedule. Gibson also pointed out that this was the only way Jordan



would get a title fight. Both Nesseth and Leonard replied to Gibson that it would be dangerous for them to inform Carbo and Palermo that Nesseth accepted their demand to give up half of the management interest in Jordan as a condition of the title fight being held, when, in fact, *Nesseth did not intend to give up that interest to them.* They received this answer:

“Truman says, ‘They wouldn’t resort to violence or anything like that, so severe.’ Besides he would take care of that, that that kind of stuff went out with highbutton-shoes. Truman said, ‘well, go along with it.’ He said, ‘It has been done before. That is the way the welterweight and lightweight title has been worked since Carbo and Blinky got into the picture.’” [5 R.T. 604; 12 R.T. 1761; 14 R.T. 2061-2062.]

Nesseth said that he would rather call the fight off than give in to their demand. Leonard told Gibson two or three times that he did not want to call Palermo. [5 R.T. 604.] Nesseth described the conclusion of the meeting with Gibson in the following manner:

“And Truman prevailed upon Leonard, finally, to go ahead and tell them [Carbo and Palermo] ‘Yes,” [Punctuation sic] and when I get in Chicago I will straighten everything out so there won’t be any problems,’ and he said, ‘It won’t cost you any money, I will take care of that and there won’t be any problems at all.’

“So we reminded Truman that these weren’t kids that we were talking to, and that he couldn’t do very much protecting from 2,500 miles away, if they decided to start playing rough, and Tru-

man scoffed at that and said that went out with high-buttoned shoes, that there wouldn't be any of that, and not to worry, that he would straighten it out." [12 R.T. 1760-1761; 30 R.T. 4473-4476.]

Gibson acknowledged, on cross-examination, that Leonard expressed a fear of violence during this discussion in connection with the commitment to Palermo. [33 R.T. 4849; 34 R.T. 4972.] He also admitted that he insisted that Nesseth sign a contract with a return match clause—not in favor of the I.B.C., the corporation whose interests he represented, "but sign a return match directly with the Akins people." [34 R.T. 4975.]

When Nesseth refused Gibson's request to call Palermo and indicate that the demand for a share of Jordan's contract had been accepted, Gibson persuaded Leonard to make the call from a public telephone in the lobby of the Ambassador Hotel. While Nesseth and McCoy waited outside the booth, Leonard made a brief call to the Bismarck Hotel in Chicago where he was connected with Palermo. Palermo obtained the number of Leonard's public telephone and told him he would call him back in a few minutes from a "pay phone". [12 R.T. 1762-1763; 14 R.T. 2062; 5 R.T. 605; Exs. 2, 3, 4, 72; 4 R.T. 421-429.]

In a few minutes the public telephone rang and Leonard had the following conversation with Palermo:

"I talked to him there, and I told him that I thought things would be all right. He says, 'What the hell do you mean, think?' He says, 'You either know whether they are all right, you can handle the situation or you can't handle it.' He said, 'Truman told us before he left Chicago that

everything was all right, that he had already talked to you out there.'

I told him this was the first we had heard about it, I thought everything would be all right.

He said, 'I don't want no thinks. Can you handle it or can you not? Otherwise there won't be any fight, we are going to pull the fight out.'

I told him, 'Truman told us there is a contract.'

Blinky, said, 'There is no contract on the fight. I told him that before he left Chicago for Los Angeles, there is no contract.' There would be no fight unless we could handle the situation the way he wanted it, by giving up half the fighter.

I said, 'All right then, you have got a deal.'

He said, 'All right then, you have got a fight.' "

[5 R.T. 605-606.]

In the parlance of professional boxing, "half of the fighter" means fifty per cent of the manager's share of the fighter's purse; the manager's share of the purse customarily is one-third. [5 R.T. 607.]

Between October 23 and December 5, 1958, Leonard received several telephone calls from Palermo. Palermo demanded assurance that Nesseth, Jordan's manager, was under control. During this same period Leonard spoke by telephone with Gibson about the plot:

"Well, I told him several times that I was worried about what was going to happen if Jordan did win the title, and he said, 'Don't worry about it,' that he would arrange everything, and kept assuring me everything was all right, not to worry.

Q. What were you worried about? A. I knew

that Mr. Nesselth wasn't going to go along with this situation. He had told me and he had told Truman Gibson that he wouldn't go along with it.

I was just wondering what was going to happen on the night of the fight if Jordan did win the title, what would happen when these people didn't receive their money or didn't receive anything at all from him.

But Truman assured me and kept assuring me if there was any finances involved, if there was any money to be involved, he would take care of it, he would pay it." [5 R.T. 617-618.]

Nesselth had Leonard tell Gibson before the December 5th title fight that they were going to tell Palermo that Nesselth did not intend to give up half of his management contract with Don Jordan:

"... Truman told him, 'Whatever you do, don't make that phone call.' He said, 'I will straighten it out here, but above all, don't tell those people that.'" [13 R.T. 1783.]

When Gibson returned to Chicago, he was visited by Akins' manager of record, Glickman, and Palermo. Glickman threatened to cancel the fight for which he had signed a contract unless Gibson guaranteed him \$40,000 rather than the 40% of the receipts stipulated in the contract. Palermo then joined the dispute and attempted to persuade Gibson by informing him that he (Palermo) now had a part of Jordan's contract. [33 R.T. 4839-4844, 4846.] Notwithstanding this knowledge, Gibson maintained on cross-examination that Palermo was not the manager of either Akins or Jordan. [33 R.T. 4900.]

Prior to this meeting, Palermo had telephoned Gibson and mentioned his share of Jordan's contract. Gibson was cross-examined on his attitude toward Palermo's conduct with respect to Leonard:

“Q. Now, when Mr. Palermo telephoned you in Chicago to tell you that he had a share of the contract, didn't you realize that there was some connection between what Mr. Leonard was telling you at your hotel and this conversation that you were then having with Palermo? A. Obviously there was a connection.

Q. Were you indignant, Mr. Gibson? A. I wasn't indignant. I had no interest in the boxer's—in the manager's contract.

Q. Well, what had Mr. Palermo done, so far as you knew, to earn a share or a part of Mr. Jordan's contract? A. I neither knew nor cared, Mr. Goldstein.

Q. You didn't care, did you? A. No, I did not.” [33 R.T. 4851-4852.]

As a result of Glickman's threat to renege on his forty per cent of gross contract, I.B.C. paid Glickman \$13,000 in excess of the Akins contract filed with the California State Athletic Commission. [33 R.T. 4857.]

On December 5, 1958, Don Jordan fought Virgil Akins at the Olympic Auditorium, Los Angeles, in a match co-promoted by the Auditorium and the I.B.C. and broadcast on nation-wide television. Jordan defeated Akins and became the welterweight champion of the world. [5 R.T. 618; 13 R.T. 1783-1784.] At the conclusion of the fight, Gibson commented to Leonard on Jordan's victory as follows:



“[W]ell, we really got our necks in trouble now. But, he says, ‘at least he has to do it twice.’”  
[5 R.T. 619.]

Leonard explained that Gibson was referring to the rematch clause in Jordan’s contract with Akins which would require him to defend his newly acquired title in a second bout with Akins. Gibson told Leonard that Carbo’s and Palermo’s share of Jordan’s purse would not be due until he won the rematch. [5 R.T. 619, 628.]

About a week after the first Jordan-Akins fight, Palermo began a campaign to induce Leonard to fly to Miami, Florida, for the ostensible purpose of meeting with James D. Norris, one of the principal stockholders in the I.B.C. Palermo told Leonard that Norris would be able to help Leonard by arranging for a fight at the Legion Stadium between Jordan and Art Aragon, if Leonard could assure them that he had Jordan under control. Palermo also attempted to arrange a meeting in Tijuana, Mexico, or Miami, Florida, with Nesseth to discuss Jordan’s future. [5 R.T. 622; 13 R.T. 1784-1785; 6 R.T. 846-847.]

Leonard attempted to stall Palermo but, in Leonard’s words:

“[H]e said, well, for my own good I should make a trip back there and see what I could about making the Aragon fight—or some money fight.

I told him I would have to call Mr. Gibson, as I owed him a debt of gratitude for the money he had given me, loaned me, and Blinky said not to let him know about it, that that is why he wanted me to come back there, was to meet the people he



worked for and not to tell Mr. Truman Gibson I was coming to Miami if I did make the trip.” [5 R.T. 623.]

During this same period Leonard was contacted by Daly who commiserated with him over his financial problems in running the Legion Stadium and told Leonard that he would contact “some people and see what he could do” about Leonard’s problems. Daly also told Leonard that he would have some money for him for Christmas. Several days before Christmas, Palermo telephoned Leonard and told him that he had spoken with Daly who had stated that the money was being sent to Leonard. [5 R.T. 623-624.]

On December 23, 1958, a \$1,000 Western Union money order was purchased in Philadelphia, Pennsylvania, payable to Jack Leonard. The application indicated that the purchasing party was “William Daley”. [Ex. 82—note misspelling.] The day after Leonard received this check in Los Angeles, Palermo called him again to insist that he come to Miami to tell Norris that Gibson and Parnassus were keeping profitable matches from the Legion Stadium. Palermo assured Leonard that Norris would help him if Leonard “could assure the right people back there that [he] could control the welterweight champion.” [5 R.T. 624, Ex. 59.]

Several more calls followed between Christmas and New Year’s Day. Leonard parried Palermo with the excuse that he could not get a flight to Miami during the holiday period. Finally, Palermo called Leonard and told him that T.W.A. had space available on January 4 and 5, 1959. Leonard replied that he could not afford the expense of the trip. Palermo responded that

Leonard had one-thousand dollars. When Leonard asked him how he knew about the thousand dollars, Palermo replied that he had sent it. [5 R.T. 625.] Palermo resided in Philadelphia, Pennsylvania; Daly was a resident of Englewood, New Jersey. [39 R.T. 5848; 21 R.T. 3062; Ex. 52.]

On January 5, 1959, Leonard flew to Miami where he was met at the airport very late at night by Palermo and one Abe Sands who was identified to Leonard only as "Mike". [5 R.T. 630, 635; 18 R.T. 2629; Ex. 50. See Section B, above, for reference to Carbo's messenger who picked up \$10,000 from Akins' manager, Glickman.] They drove him about 25 miles to the Blue Mist Motel where Palermo and Leonard occupied adjoining rooms. Palermo had already registered; thus, Leonard was not asked to sign the register. [5 R.T. 636-637.] Palermo had registered that afternoon for two rooms as *George Tobias, 1620 Wood Street, Carbondale, Pennsylvania*. [17 R.T. 2558-2564; Exs. 107-A, 107-B, 107-C.]

After arriving at the Blue Mist Motel, Leonard asked Palermo if Norris was in town. Palermo replied that Leonard had just missed Norris because Norris had to leave in connection with some race horses; however, Norris would probably return the next day. Leonard retired for the night on Palermo's statement that they would arise early in the morning and try to see Norris and "some people". [5 R.T. 637.]

When Leonard awoke the following morning, Palermo informed him that they would have to move out of the Blue Mist Motel, because he had had an argument with the management on the preceding evening. They packed

their bags and moved into a neighboring motel, the Chateau Resort Motel. Each registered separately for their adjoining rooms. Leonard registered as "Jack Leonard" and gave his office address in Hollywood, California. [5 R.T. 638-639; 17 R.T. 2567; Exs. 109-A, 109-B.] Palermo registered as *Lou Gross, 1620 Wood Street, Lehigh County, Pennsylvania*. [17 R.T. 2567-2568; Exs. 108-A, 108-B.]

During breakfast, Abe Sands (Mike) escorted Carbo into the motel coffee shop. Sands commented that he had been driving most of the night. Carbo admonished Leonard for not arriving sooner:

"'If you had been here yesterday you would have seen the whole mob out at Mr. Norris.'" . . .  
'Now, you missed him. He won't be here today. He had some business to attend to. But, . . . I will have to handle it.'" [5 R.T. 638-639.]

Back in the room, Carbo did most of the talking. He wanted to know if Leonard could control Nesseth and Jordan. Carbo became volatile when Leonard express doubt and said, "Can you or can't you?" [5 R.T. 639-640.]

Then, for the first time, the demand of a Jordan-Sugar Hart title match was made. [See Indictment, Counts One, Four, and Five.] Leonard testified:

"Blinky interrupted to tell me that the day before he had met with Sugar Hart's manager and he had made a deal to take over Sugar Hart, and he now had a listing and he had Sugar Hart and that we were going to have to arrange a fight with Sugar Hart and Don Jordan. [The preceding week

Hart had won a match in Miami against Ralph Dupas to become number one welterweight contender. 31 R.T. 4629.]

I told him then I didn't think Nesseth would go for a Sugar Hart fight, that, 'He can make a lot more money fighting easier fights than Sugar Hart.'

He said, 'He has got to. The only reason I got control of Hart is by telling the manager I would get a title for him.' He said, 'What the hell is the difference?' He said, 'A fighter wins the title and Nesseth gets 15 per cent of Hart.' He said, 'That is the way it works.'

At this time I think Mr. Carbo said that he didn't care so much about the money, he didn't want the money himself, that he wanted to see that Blinky Palermo got the money, because that would keep him out of his pocket. He said, 'As long as these fellows are making money I don't have to be doling out money to them.' He said he would be interested if it was a lot of money, but that kind of money Blinky and his fellows could handle." [5 R.T. 640.]

Chris Dundee, a Miami promoter and defense witness, and Gabe Genovese, a former manager, entered the suite. Carbo and Dundee retired to the other room, leaving Genovese with Palermo and Leonard:

"Mr. Genovese said he was glad I got into the family and got acquainted with Carbo, and he was telling me what a great guy he was. That now I should make a lot of money and everybody should make a lot of money, because he could get me the

big-name fighters, and he told Gibson to give me some good television fights, and we all would make some money.” [5 R.T. 641; 22 R.T. 3190.]

Genovese questioned Leonard for his estimate of the profits which Parnassus should have realized from promoting the Basilio-Aragon fight in Los Angeles. When Leonard estimated \$70,000 or \$80,000, Genovese exploded:

“[H]e said he was going to get on George Parnassus because he only received \$10,000.00 for allowing Basilio to fight; that he and Carbo only got \$10,000.00.” [5 R.T. 641.]

Carbo then re-entered the room and Genovese reported Parnassus’ deception to him. Carbo’s response:

“. . . Carbo shouted a few vulgar words and said that Greek would never get another fighter unless he guaranteed him a tremendous amount of money, he was going to make him put up a hundred thousand dollar deposit if he wanted to book Basilio or a top rank fighter again. He said he had told Genovese before not to deal with the Greek but that he had went ahead and dealt with him anyhow, so he said, ‘It’s good enough for him.’ ” [5 R.T. 642.]

Then, Dundee and Genovese departed. Carbo told Leonard that if he would control Jordan, he (Carbo) would see to it that the I.B.C. would give Leonard “a lot of good television fights and big named fighters.” [5 R.T. 642.]

When Leonard asked permission to leave the motel to take a walk, Carbo ordered him not to leave the



room. At no time while Leonard was in Miami did the defendants leave him alone. Before leaving the motel, Carbo and Palermo repeated their previous demands in an abusive manner. [5 R.T. 642-643.]

Before returning to the Miami Airport for his flight to Los Angeles that night, Palermo and Sands drove Leonard to Joe Sonken's Gold Coast Restaurant and Cocktail Lounge for dinner. [5 R.T. 644; 6 R.T. 726; Ex. 59.] During the meal, Palermo left the table and met Carbo in a corner of the restaurant where they appeared to exchange money. On the way to the airport, Palermo made a stop at an apartment a short distance from the restaurant where Leonard saw Carbo and an unidentified woman. [5 R.T. 644-645; Ex. 51.] After conferring privately in the bedroom for a few minutes, Carbo and Palermo rejoined Leonard in the front room. Leonard testified:

"The only thing Carbo said to me was that, 'Are you sure you can handle everything all right now?' I said, 'I'll try.'

He said, 'God damn it, don't try, you are going to do it, aren't you? You are the man we are looking for and you are the man responsible out there.' He said, 'This is your baby and you are the one that is going to handle the thing.'" [5 R.T. 645-646.]

Carmen Basilio, former welterweight champion, and his co-manager, John DeJohn, had a similar experience in Miami that same month. DeJohn received a call to visit James Norris, was picked up by a driver named "Sandy or Smokey", [note Leonard was chauffeured by Abe Sands], and delivered into the presence, not of



Norris, but of Frank Carbo. Basilio also saw Palermo in Miami at about this time. [44 R.T. 6574-6576; 20 R.T. 2833-2837.]

Within a few days after Leonard's return to Los Angeles, he received telephone calls from Palermo and Carbo, checking on whether he had Nesseth under control. Carbo again assured Leonard that if Leonard kept Nesseth under control, Norris had confirmed that I.B.C. would give Leonard considerable assistance. [5 R.T. 647.]

Leonard's reactions after the Miami conference with Carbo and Palermo were described by him as follows:

"A. Well, I left there with a couple of reactions. I was scared when I found out how powerful they were, and they told me as long as I went along with them, I was in business and would be in business, and if I didn't I would be out of business.

Q. What were you scared of? A. Two ways. The way they talked physically and the other way, they would put me out of business if I didn't go along with them." [5 R.T. 671.]

A non-title, non-televised fight between Don Jordan and Alvaro Gutierrez was scheduled for January 22, 1959, at the Olympic Auditorium, between the first and second Jordan-Akins title bouts. [13 R.T. 1788-1789.] Prior to that fight, Leonard was contacted by Gibson and Palermo three or four times during January, 1959. Leonard asked Gibson who was going to pay the money expected by Carbo and Palermo out of Jordan's purse from that fight. Leonard testified:

“He said, ‘Don’t worry about it, I told you we will straighten it out. If nothing else, if there is any money involved,’ he says, ‘Nesseth won’t have to pay a penny of it,’ he would take care of it.

In the meantime I heard from Blinky two or three times, wanting to know if everything was all right, and Truman told me to keep telling him everything was all right, so I kept telling him everything was all right. And it was sometime prior to the fight, sometime around the 16th or 17th of January that Blinky told me where to send the money to, Philadelphia. . . .

\* \* \* \* \*

“He told me to send it to a woman by the name of Clare Cori and he gave me her address in Philadelphia and I wrote it down.” [5 R.T. 648-649; Ex. 52.]

During the trial, Palermo admitted that Clare Cori was his wife. [39 R.T. 5827.]

Gibson evidenced his peculiar interest in the Akins group by intervening at Parnaussus’ request to obtain a release for Jordan from his obligation not to have any fights before the Akins rematch. This was not a televised fight. In order to obtain Glickman’s consent to Jordan’s fighting Gutierrez, the I.B.C. had to pay him \$2,500 to which Gibson did not believe Glickman was entitled. Gibson further admitted discussing a proposed Jordan-Gutierrez fight with Palermo during December, 1958. [33 R.T. 4865-4878.]

Jordan won by a knockout on January 22, 1959. His purse was \$12,500 plus expenses. [5 R.T. 649; 13 R.T. 1792. ] Palermo began calling Leonard after the

fight to find out when the money was going to get to Philadelphia. Gibson assured Leonard by telephone that he would get a check out to Leonard in Los Angeles to satisfy Palermo's demands. On January 27, 1959, Leonard, Nesseth, and McCoy met Gibson again at his suite in the Ambassador Hotel in Los Angeles to discuss the Jordan-Akins rematch. [5 R.T. 650; 13 R.T. 1793; 14 R.T. 2063.]

Leonard, Nesseth, and McCoy all recalled an incoming telephone call while they were in Gibson's suite. Gibson told them that the call was from Palermo for either Leonard or Nesseth. Gibson told his visitors that he had told Palermo that they were not there because he did not want them to talk to Palermo from his room. [5 R.T. 650-651; 13 R.T. 1794-1795; 14 R.T. 2065.]

When Leonard and Nesseth left Gibson's suite, they went to Leonard's home where Leonard's wife gave him a message. He was to call "Frank" at the "Palermo Hotel back east." Previously, Palermo had given Leonard two telephone numbers to call in the Philadelphia area: HILLtop 9-1585 and FULTon 9-2664. [5 R.T. 651, 654-655; 39 R.T. 5890; Ex. 52.] Telephone records reflect that the FULTon number and its successor, FULTon 9-6441 were installed under the name of Felix Corey at 1350 S. Grove, Philadelphia, Pennsylvania. [4 R.T. 468-469; Ex. 19.] Felix Corey was the father of Clare Cori. [39 R.T. 5884-5886.] The HILLtop number was installed under the name of Mrs. Margaret Dougherty at 211 South Lynn Boulevard, Highland Park, Pennsylvania. [4 R.T. 487-488; Ex. 28.] Palermo had instructed Leonard to call him person-to-person as "Mr. Badone" or "Mr. Tobias"; other-

wise to call station-to-station. [5 R.T. 678-680; note Palermo's registration in Miami, above, and in Beverly Hills, below, as "George Tobias": Exs. 107-A, 84-A, 85-A, 34.]

Leonard went to a public telephone booth in Hollywood accompanied by Nesseth and placed a prepaid call station-to-station to the Fulton number in Philadelphia. The call was connected at 5:23 p. m. P.S.T. and lasted 5 minutes and 53 seconds. [5 R.T. 656; 13 R.T. 1796; Ex. 13.]

Palermo answered the telephone and an extortive conversation [See Indictment: Counts One, Two, Three, Six and Seven] ensued as follows:

Palermo was angry because he had not received what he considered to be his share of the Jordan-Gutierrez purse. He screamed and hollered at Leonard, claiming he was double-crossed and that Leonard was stalling him. Leonard tried to pacify Palermo by telling him that he had seen Gibson that day and the money would be sent. Palermo responded that he didn't "want to hear anything about Gibson." Leonard testified: "He [Palermo] was holding us responsible, and he wanted that money right away." Leonard heard a voice in the background say, "Give me that phone," at which point, an angry, shouting, Frankie Carbo took the telephone from Palermo:

"He said, 'You son-of-a-bitching double-crosser.' He said, 'You are no good,' and he says, 'Your word is no good. Nothing is no good about you.' He said, 'Just because you are 2,000 miles away, that is no sign I can't have you taken care of.'

He said, 'I have got plenty of friends out there to take care of punks like you.' He said, 'The money had better be in.' " [5 R.T. 658.]

Leonard then recited the first threat that Carbo intended to use West Coast connections to obtain his ends:

"I was trying to get a word in edgewise, to tell him the money would be sent that day. He wouldn't let me say anything, he was just cursing and hollering at me and *saying there would be somebody out here to take care of me, and if that money wasn't there right away somebody would be looking me up.*" [5 R.T. 658. Emphasis supplied. See Indictment, Count One, paragraph 3c and Count Five, paragraph 3c.]

Leonard explained that Carbo and Palermo told him in no uncertain terms that he was expected to handle Nesseth and that he was badly frightened by the conversation. After hanging up, he turned to Nesseth who had been standing next to the telephone booth, and told him everything that had been said. [5 R.T. 657-659.]

Nesseth recalled that they did not have sufficient money for the overtime telephone charges and that he obtained ten or twelve additional quarters. [13 R.T. 1796.] Corroborating this is the fact that the toll slip recording this call reflects that the calling party deposited eighteen quarters, three dimes, and two nickels. [Ex. 13.]

Nesseth testified that Leonard reported the conversation to him as he left the telephone booth as follows:



“[T]he substance was that if these people didn’t get the money that they felt they had coming from the Jordan-Gutierrez fight, they were going to take it out of Leonard’s hide. This wasn’t actually all that was said, but that was the substance of it.” [13 R.T. 1798.]

Leonard’s appearance upon leaving the telephone booth was characterized by Nesseth as “shaken up, nervous.” [13 R.T. 1798-1799.]

On January 28 or 29, 1959, Leonard contacted Gibson in Chicago and told him about the threatening telephone call from Carbo and Palermo and his fears in connection therewith. Gibson told Leonard not to worry, that he was sending the money out to Leonard right away. [5 R.T. 660.] On February 6, 1959, Leonard telephoned Gibson at the office of the I.B.C. in New York City. Gibson told Leonard to send the money demanded and he would reimburse Leonard for his outlay. [Ex. 4.] Leonard informed Gibson that 15 per cent of Jordan’s purse amounted to \$1,800, and that he did not have the money. Gibson told him to withdraw the money from the Club account in order to make the payment and promised to reimburse the Club. Leonard pointed out that the Club bookkeeper, James Ogilvie, had instructions from Gibson not to give Leonard money without Gibson’s approval. [15 R.T. 2142-2143.] Gibson replied that he would call Ogilvie and authorize him to give Leonard the money. [5 R.T. 660-661.]

On or about February 12, 1959, Gibson telephoned James Ogilvie, Secretary-Treasurer of the Hollywood Boxing and Wrestling Club, who at the time of the

trial was a property manager in the Trust Department of the Citizens National Bank. [15 R.T. 2138-2139.] Ogilvie testified that Gibson told him that “as a favor” to an unidentified friend, Ogilvie should draw an \$1,800 check on the Club to the order of “cash” and give it to Leonard who would reimburse the Club. “He stated I believe that he had to pay a friend that needed the \$1,800.” [15 R. T. 2140-2141.]

At no time during this call, according to Ogilvie, did Gibson refer to “Porterville, California” or a “Porterville promotion”, which was the false explanation which Gibson placed in the I.B.C’s books to cover the subsequent issuance of an \$1800 Chicago Stadium check to Leonard. [15 R.T. 2141; Ex. 57.]

On February 6, 1959, Leonard had mailed his personal check in the amount of \$1,725.00 payable to “Clare Cori” [Ex. 53] to Clare Cori via registered mail [Ex. 55] return receipt requested. [Ex. 54.]

Because of Leonard’s fear of Palermo and Carbo, arising out of the January 27th threatening call, Leonard back-dated his check to January 27, 1959. When Palermo called him on February 5 or 6, asking why the money had not arrived, Leonard told him that it had been mailed on the 27th of January but had been returned because his son, who mailed it, had forgotten to put postage on it. [5 R.T. 663-665.] The check was delivered to the addressee in Philadelphia on February 7, 1959. [Ex. 54.]

On February 12, 1959, after Gibson’s call authorizing the transaction, Ogilvie issued a check in the amount of \$1,800 on the Hollywood Boxing and Wrestling

Club payable to cash and indorsed by Leonard. [15 R.T. 2141, Ex. 57.]

A few days later, the Club was reimbursed for this \$1,800 check with an \$1,800 check drawn by Gibson on the Chicago Stadium Corporation bank account and payable to Jack Leonard. [15 R.T. 2141-2142; 5 R.T. 666-667; Ex. 56.] Records in the files of the Chicago Stadium Corporation pertaining to this transaction reflected that a check requisition was issued by Gibson to draw the \$1,800 check on February 10, 1959, to the payee Jack Leonard, in the amount of \$1,800.00, to be mailed to Leonard at the Hollywood Legion Stadium. Under the heading, "Remarks", the requisition described the purpose of the disbursement as: "*Advance, Promoter's share of April fight, Porterville, California*". [Emphasis supplied.] This false entry was in Gibson's handwriting. [6 R.T. 787-789; Ex. 66.] As of September 30, 1959, the account receivable in the amount of \$1,800 set up on the books of the Chicago Stadium Corporation based on this check was charged off as an uncollectible bad debt. This charge-off was done at Gibson's direction. [6 R.T. 793-794.]<sup>1</sup>

Leonard's \$1,725 check mailed to Philadelphia and made payable to "Clare Cori" was collected by the First

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<sup>1</sup>Leonard explained that he sent Palermo only \$1,725, although 15 per cent of \$12,000 is \$1,800, because in one of Palermo's calls Leonard had complained that he had run up large telephone expenses, and Palermo told him to deduct them from the payment; Leonard deducted \$75.00. [5 R.T. 665.] Prior to the Jordan-Gutierrez fight, Palermo had told Leonard that they wanted "15 per cent off the top" rather than one-half of the manager's share of the purse. "15 per cent off the top," in professional boxing parlance means 15 per cent of the fighter's gross purse. Palermo explained to Leonard that this revised demand avoided for Carbo and Palermo the problem of padding of expenses by the manager before computing their share of the purse. [5 R.T. 665.]

National Bank, Hollywood, Florida. It bore the prior indorsements of "Clare Cori" and one Joe Sonken. Sonken was the proprietor of the restaurant to which Leonard was taken by Palermo during his brief trip to Miami on January 6, 1959. [Exs. 53, 58.]

The check had been cashed for Palermo by Sonken through a check exchange transaction in which Sonken deposited in his bank account the \$1,725 check payable to "Clare Cori" and then issued his own check payable to a fictitious person, one "Carmen Cosara." Sonken indorsed not only his own name on the check but also wrote the fictitious name "Carmen Cosara" thereon. Sonken charged Palermo a \$25 fee for cashing the check. [21 R.T. 3011-3018, 3020-3024; 17 R.T. 2570-2572; Exs. 53, 110-A, 110-B, 110-C, 124.]

Although Palermo contended at the trial that this check represented partial repayment of a loan by Leonard and did not constitute income to him, this was refuted by the rebuttal testimony of Palermo's own accountant, Irvin Sklar of Philadelphia, who had prepared Palermo's 1959 federal income tax return. Palermo had advised Sklar that he had received \$1,725 income from "Jackie Leonard" in 1959 from a "boxing promotion for services rendered". [40 R.T. 5969-5970; 44 R.T. 6307-6308, 6620-6626, 6629-6636, 6644-6645; Exs. 53, 170, 171, 172, 174.]

Palermo's acknowledgment of receipt of the \$1,725 Clare Cori check was described by Leonard:

"... Blinky Palermo called me and cursed me out and everything, screaming at me for sending a personal check. He said I should have known better than that and from now on he didn't want to never

hear of anything like that. To do it some other way, but no personal check at all.

\* \* \* \* \*

He told me to send a money order or any kind of way except a personal check.” [5 R.T. 670-671.]

Carbo and Palermo apparently returned to Florida after the January 27 call from Philadelphia, because they were visited by John DeJohn and Gabe Genovese in February, 1959, at a private meeting in the Treasure Island Motel in Miami. [44 R.T. 6576-6577.]

After receiving the money for the Jordan-Gutierrez fight, Palermo assumed a more friendly demeanor toward Leonard, assuring him that Carbo would aid Leonard in his efforts to obtain nationally televised bouts from the I.B.C. for the Hollywood Legion Stadium. Palermo referred to Carbo in these calls as “The Man” or “The Gray”. [5 R.T. 671-672.]

During this same period between the payment of the \$1,725 to Palermo and the second Jordan-Akins fight on April 24, 1959, Gibson began to take a new tack on the mode of paying Carbo’s and Palermo’s share of Jordan’s future purses. Leonard described his conversations with Gibson during this period:

“In the meantime I talked to Truman a few times about trying to get some shows, also, because we were not getting any good fights at the time and were in financial difficulties all the time.

Truman assured me he was going to give me some good fights, but to try to get Don Neseth into line a little bit, that Don was acting like a child, and that after all, he should go along with



these fellows because the promoters usually pay that money anyhow. That if it is four or five thousand dollars, they can usually get it marked off as expense money, and that it wasn't going to be anything out of his pocket." [5 R.T. 672-673.]

About two weeks before the Jordan-Akins rematch in St. Louis, Missouri, Nesseth was told by Leonard that Palermo wanted to see Nesseth in East St. Louis when Nesseth arrived in St. Louis for the fight. [13 R.T. 1803-1804.]

On April 22, 1959, two days before the title rematch, Leonard received a telephone call from Palermo. Palermo wanted to know if Leonard was coming to St. Louis for the fight. When Palermo learned that he was not, Palermo said:

"'. . . Jesus, you got to be here. You have got to help settle this thing.' He said, 'You have got to give us some money and I want him to fight Hart.'

I said, 'Well, Jesus, I told you before that I didn't know about Hart. I am almost positive that Nesseth will never fight Hart.'

He said, 'Well, he is going to have to fight him.'

I said, 'What are you doing, taking over complete possession of Jordan?'

And he said, 'In a way, yes. We want to know who he is fighting for, who he is fighting, what he is fighting, and we have got to give the O.K.' He said, 'Carbo told you that in Miami, that if you are going to work with us you have got to go all the way with us or you won't get any help at all out there.' " [5 R.T. 674-676.]

Nesseth and his party arrived in St. Louis on April 14, 1959, and stayed at the Kingsway Hotel. [13 R.T. 1804.] Leonard remained in Los Angeles. On the night of the fight, April 24, 1959, Nesseth, considered an outsider by the professionals in the “boxing game,” was standing in a room adjacent to his fighter’s dressing room when he was first confronted by Palermo. Palermo was introduced to Nesseth as “‘somebody you should know. . . .’” [13 R.T. 1805-1806.]

Fearing a confrontation with Palermo, Nesseth had met with Sergeant Edmund Moran, head of the hotel squad of the St. Louis Police Department. [13 R.T. 1806; 18 R.T. 2622, 2624-2625.] Before the fight began, Moran had observed Nesseth leave Jordan’s dressing room and walk down the hall to Akins’ dressing room. When Nesseth returned a few minutes later he spoke with Moran. Moran was asked:

“Q. And would you tell us how Mr. Nesseth looked when he came back? A. Well, he was—he was scared.” [18 R.T. 2625-2626.]

Moran then asked him what the matter was and proceeded to a vacant dressing room at the head of the stairs where he observed Palermo and two other men in conversation for about five minutes. One of the two other men was Morris Shenker, an attorney. [18 R.T. 2624-2627.] During the fight, Moran observed Palermo confer with Akins’ manager Glickman in Akins’ corner. [28 R.T. 4207.]

Jordan won the decision over Akins on April 24th and retained his world welterweight championship. The fight was promoted by Sam Muchnick of St. Louis, Missouri. Gibson’s corporation, Title Promotions, Inc.,

promoted the television aspects of the fight. [Exs. 111, 112, 115.] However, Muchnick did not make the match; it was handed to him already made. [18 R.T. 2611.] On the evening of the fight, Muchnick, too, had observed Palermo in the dressing room at the head of the stairs. He had not authorized Palermo to enter the dressing room area which was not open to the public. *To his knowledge*, Palermo had no connection with the management of either Jordan or Akins. [18 R.T. 2598-2599.]

The morning after the fight, Muchnick was visited by Palermo and Glickman. Glickman asked Muchnick for a financial statement on the fight: the gross receipts, the net receipts, and the amount the fighters were supposed to receive. Each fighter was to be paid 30 per cent of the receipts and \$15,000 from the payment for the national television rights. [18 R.T. 2601.] Muchnick had received \$55,000 for these rights from the Gillette Safety Razor Co., the television sponsor. [18 R.T. 2619-2620; Exs. 114, 115.] Muchnick testified:

“When Mr. Glickman asked me for the statement, I had the statement in front of me and I handed it to him and he looked at it. Then he tossed it back to me and said, ‘What is 15 per cent of this?’

\* \* \* \* \*

[A]nd I took a pad and I figured it out and I handed it back to him.

During the course of the conversation either Mr. Palermo or Mr. Glickman mentioned something about Jordan or Neseth owing some money and Mr. Glickman said, ‘Well, Sam can’t pay out any

money because all the purse has to go through the State Athletic Commission.'

And Mr. Palermo asked if I had heard from Mr. Leonard about some money owed him, and I said, 'No, sir, I didn't.'

\* \* \* \* \*

[A]bout that time I told Mr. Palermo there had been a telephone call asking for him, and Mr. Palermo told Mr. Glickman to call his attorney, Mr. Morris Shenker, and Mr. Glickman made several calls and finally located Mr. Shenker, and when he did Mr. Palermo talked to him on the telephone, and when he was through with the conversation he turned around to Mr. Glickman and he said, 'I have got to leave. Mr. Shenker told me to leave.' And Mr. Palermo left." [18 R.T. 2601-2602.]

Included among the payments made for the account of Akins' management by Muchnick in connection with the second Jordan-Akins fight was a \$200 check drawn by Muchnick, at Glickman's request, payable to Palermo's attorney, Morris Shenker. [18 R.T. 2604, 2606-2607; Ex. 113.]

Later that morning, Nesseth visited Muchnick's office to obtain his share of Jordan's purse. [13 R.T. 1807; 18 R.T. 2607.] Later that day, as Gibson was leaving the Chase Hotel in St. Louis to return to Chicago, he met Palermo who was on his way to the Kingsway Hotel to talk to Nesseth. Gibson described his conversation with Palermo as brief and to this effect:

"He asked me if I would go over and see Nesseth with him and help him get a matter straightened out that was in confusion." [31 R.T. 4617-4618.]

Gibson testified that Palermo did not elucidate what the "matter" was. [31 R.T. 4618.] Palermo testified:

"On my way out I ran into Mr. Truman. He had a party with him. He was going to the airport, he was leaving for the airport.

So I says, 'I'm going over to see Nesseth for a minute.' I don't recall whether I asked him to go along with me or not, but I think Mr. Truman is a little mistaken, because I told him I was going over to see Nesseth." [39 R.T. 5820.]

When Palermo arrived at the Kingsway Hotel, Nesseth was in the room of his friends Don Chargin and Harvey Livingston. Chargin was a fight promoter from Oakland, California. [15 R.T. 2216.] Livingston was an automobile tire dealer from Hayward, California, and the manager of the top ranking lightweight fighter Johnny Gonsalves. [16 R.T. 2322, 2328, 2330.]

Palermo called Nesseth on the house telephone from the lobby and told him that he wanted to talk to him. Nesseth told him to come up. [13 R.T. 1808.] Muchnick received a call from Nesseth and then called Sergeant Moran at his home. [18 R.T. 2607.] Moran then telephoned Nesseth who had a cryptic conversation with him while Palermo, Chargin, and Livingston were in the room. [18 R.T. 2627-2628; 13 R.T. 1813-1817.] Moran then left for the Kingsway Hotel. [18 R.T. 2627-2628.] Palermo told Nesseth that he wanted to talk to him in private. [13 R.T. 1808-1809; 15 R.T. 2219; 16 R.T. 2325.] Nesseth testified to the conversation in the adjoining bedroom alone with Palermo as follows:

"[W]ell, the first thing he said, when he walked in he said, 'You know why I am here?'



I said, 'Yes, I know why you think you are here.'

He said, 'I want my money.'

I told him that I didn't owe him any money.

And he said, 'Well, you paid me the last time,' referring to the Gutierrez-Jordan fight, and I said, 'I have never paid you a cent and I don't intend to.'

Then I repeated everything that had happened at the Ambassador Hotel, the fact that I had never gone along with the deal and that Truman had insisted that Leonard tell him that I was going along with the deal, and the only reason I was meeting with him this time was that I didn't want to be hiding from him all the time, playing cat and mouse, that I wanted to sit down and tell the man my story of the actual truth of the matter. And I also told him that if Truman wanted to give him \$10,000 every time Jordan fought, that as long as it didn't cost me anything, I didn't care if he got the money.

So Blinky said, 'Well, we better call Truman about this.'

And I told him, I says, 'Well, Truman doesn't owe me any money and I am not going to call him.'

He then wanted me to go to Chicago with him to confront Truman, and I informed him that I wasn't going to Chicago with him, and I didn't want to go anywhere with him.

And I had to repeat this to him; we probably went back and forth over this three or four times in order for him to clearly understand it, and *he made the remark that some mighty big people were*

*going to be unhappy about it and that I hadn't heard the end of it."* [13 R.T. 1809-1811. Emphasis supplied.]

Nesseth told Palermo that he did not like Palermo's visit to Sam Muchnick's office to attempt to collect 15 per cent of Jordan's purse on the representation that "he had it coming." Palermo replied that "he thought he had the money coming and he went to get it." The meeting was ended by a telephone call for Nesseth in the adjoining room. [13 R.T. 1812.]

As Palermo was leaving:

"[H]e stood by the door and said, 'Well, I am going to be out to the Coast and we are going to have a meet.'

Q. A what? A. A meeting. He called it 'a meet'.

Q. A meet. A. Yes. And I said, 'Well, I told you I met you this once to explain my situation and the truth of the matter, and I don't want to meet you on the Coast or anywhere.'" [13 R.T. 1812-1813.]

Chargin recalled that Nesseth was called to the telephone while Palermo was in the bedroom and that Nesseth said to the party on the line: "The people are here. Why don't you come over?" [15 R.T. 2223. Apparently Nesseth's cryptic conversation with Sergeant Moran.] He also remembered that Palermo and Nesseth were talking when they finally left the bedroom on Palermo's way out:

". . . Mr. Palermo asked Don Nesseth to accompany him to Los Angeles and then Nesseth replied that—to Palermo that, 'You don't understand

English very well. I told you that I was going to see you this once and not again.'

And then Mr. Palermo said that—mentioned that, "The Man" is not going to like this.' And then he—then is when he asked Mr. Nesseth to go to Chicago to see Truman Gibson.' [15 R.T. 2225. Note Palermo's earlier reference to Carbo as "The Man" in telephone conversations with Leonard.]

Livingston also testified to his observations as Palermo was leaving the bedroom:

"Then when he came out he said something about a meeting in Chicago and Don Nesseth said that he didn't want anything to do with him, he didn't want to have no meeting with nobody.

And then Mr. Palermo said, 'Well, "The Man" isn't going to like this,' and he got up and left." [16 R.T. 2325.]

Sergeant Moran arrived after Palermo had departed. Nesseth related Palermo's demands to Moran. [Exs. 97, 96-A for Ident. at pp. 70-71.]

After leaving Nesseth, Palermo telephoned Leonard in Hollywood. Leonard testified:

"[H]e told me, 'What the hell is going on?' He said he wanted his money, that he went to see Nesseth and Nesseth practically threw him out of his hotel room. Nesseth wouldn't talk to him at all and wouldn't have no dealings with him.

I told him, 'Well, he is the man you have to see.'

'Well,' he said, 'I will be out on the Coast to see you.'

I said, 'There is no use you coming out on the Coast to see me, you are still going to have to see Nesseth whether you are here or there.'

He said, 'I am coming out and I will see you in a few days.' " [5 R.T. 676-677.]

On Monday, April 27, 1959, Leonard received a call from Gibson:

"... Truman was upset with Don Nesseth and myself and all of us.

\* \* \* \* \*

[H]e had heard that Don Nesseth had made a release or something up at St. Louis that he was going with [Cus D'Amato], who had the heavy-weight champion of the world Floyd Patterson at that time, and he was trying to form his own organization.

Truman was very upset. He said, 'Although I am upset with you, Jackie, and Nesseth, and everybody else,' he said, 'how much was the purse Jordan made Friday night?'

I told him I didn't know exactly, all I knew was what I had seen in the papers. He told me to find out exactly what it was when Nesseth got into town, because either way, he said, 'Although you guys were no good,' that he was going to have to pay these people because he had agreed to pay them, and he was going to send me a check for the money and for me to send it to them. He said the way he figured it would be somewhere between four thousand and four thousand five hundred dollars. [Note Gibson's payment of \$9,000 to Palermo on May 15, 1959, discussed below.]

I think I told him when I seen Nesseth I would have him call him or I would call him and let him know what the purse was.” [5 R.T. 677-678.]

A telephone toll slip reflects that a person-to-person telephone call was placed from the Chicago Stadium for “Leonard” at the Hollywood Legion Stadium on April 27, 1959. The call was connected at 1:43 p.m., Chicago time, and lasted 6 minutes and 8 seconds. [Ex. 45.]

The same day Palermo called Leonard again:

“ . . . I believe it was on that same Monday that I talked to Truman, and asked me if I had seen Nesseth. I told him no, he was in Indianapolis, I believe it was, that he was back East, anyhow, and he hadn’t gotten back yet.

He told me I would be hearing from him right away, I better do something to straighten this mess out *or I was going to get into a lot of trouble with the people back East.*” [5 R.T. 678. Emphasis supplied.]

On Monday evening, April 27, 1959, the Nesseths and Chargin checked out of the Edison Hotel in New York and flew to Los Angeles, arriving there on April 28. Chargin left the Nesseths at the Los Angeles International Airport and flew to San Francisco. Nesseth went to Leonard’s office at the Hollywood Legion Stadium. [13 R.T. 1818; 17 R.T. 2531, 2547-2551, Exs. 104-A, 104-B, 105-A, 105-B.]

While Leonard and Nesseth were discussing the events of the last few days, the telephone rang and Leonard answered:



“[T]he voice said, ‘Hello, hello, hello. You know who this is?’

I says, ‘Yeah, I know who this is.’

And he says, ‘You’re a no good’—and he used some vulgar language and called me a double-crosser and *told me that he was going to get somebody to take care of me, that if he was there, he would gouge my eyes out, and I was going to get hurt, and when he meant hurt, he meant dead,* and he called me another S.B. and different names, real bad names, ‘double-crosser,’ and he says, ‘*We are going to meet at the crossroads,*’ he says, ‘*You will never get away with it.* I have had that title 25 years and no punks like you are going to take it away from me,’ and he repeated that statement, he says, ‘*When I mean get you, you are going to be dead,*’ he said, ‘*We will have somebody out there to take care of you.*’

And with that, he hung up.

Q. Who was it? A. Frankie Carbo.

Q. Was there anybody in the office when you received this call? A. Yes, sir. Don Nesseth was sitting right next to me.

Q. What was your reaction after this telephone call? A. Well, for one time in my life I was really scared. *I vomited.*” [5 R.T. 680-681. Emphasis supplied.]

Nesseth testified to what he observed while Leonard was on the telephone:

“What I heard from Leonard’s end of the conversation, there wasn’t very much conversation on his part. One or two times he stammered and said, ‘You shouldn’t say those things.’

But the call, I would say it was very one-sided, and I did notice and observe that Leonard turned about the color of your shirt during the course of that conversation, and when the phone call was over and he hung up the phone he sat there just for a second and he got up and ran across the hall to the ladies' room, which we use during the daytime as a men's room, and *he vomited*. I have never seen anybody any more shaken up than he was at that time." [13 R.T. 1819. Emphasis supplied.]

When Leonard returned to his office he related to Nesseth what Carbo had said on the telephone. Nesseth corroborated Leonard's testimony about the conversation and said that he became frightened when he heard what Carbo had said. He recalled that Leonard quoted Carbo as saying that he had "friends on the West Coast." [13 R.T. 1824-1826.]

Leonard testified to the events of the next few minutes as follows:

"Within five to ten minutes, the phone rang again and it was Blinky Palermo and I jumped on him about having Carbo call me and threaten my life, threaten me, and he says, 'Well, Jesus, he was right, wasn't he?'

He said, 'What do you think you got coming?' He said, 'You are nothing but a double-crosser.' He says, 'You had it coming. Anything he said you had coming.'

And he said, I was a double-crosser and I was no good and he was coming to the coast and *he was going to see some people and they were going*

*to see me.* And I told him there was no good to come, that I was mad, I was very mad, and I hung up on Blinky.” [5 R.T. 681-682, Emphasis supplied.]

Nesseth also corroborated Leonard’s testimony as to Palermo’s threatening call. [13 R.T. 1827-1828.]

Telephone toll slips produced by the Bell Telephone Co. of Pennsylvania reflect the following: on April 28, 1959, two long-distance calls were placed to Leonard’s office at the Hollywood Legion Stadium from one of the telephones regularly used by Palermo in Philadelphia. [Exs. 6, 19; 39 R.T. 5884-5886, 5890.] The first call (from Carbo), person-to-person to “Jack Leonard”, lasted 6 minutes and 36 seconds. [Ex. 21.] The second call (from Palermo), received four and one-half minutes after the first, was a 30 second station-to-station call to the Hollywood Legion Stadium. [Ex. 22. See Indictment: Counts 1, 5, 8 and 9.]

Leonard related his experiences immediately following the second telephone call on April 28, 1959:

“Well, I got sick, sick to my stomach and everything, and I went home and about several hours later when I got home, I received another call from Blinky at home. He wanted to know if I cooled off yet and said, ‘Jesus, there is no use being like that.’ He says, ‘After all, maybe the guy shouldn’t have called like that, but’ he said he figured he had a right to, ‘they have had that account a long time and you people out there are double-crossing him.’ He said, ‘Now, we might as well be like gentlemen and not be mad,’ and he says, ‘I will be out there and talk to you.’

I said, 'There is no use of coming out here, I am fed up with all of you,' and I told him he would have to see Nesseth and he said, 'I can't see Nesseth unless he will sit down and talk to me.' And I said, 'You will have to take care of that, there is nothing I can do about it. Nesseth doesn't want to talk to any of you and if you want to talk with him, you will have to make your own contact with him.'

With that he said, 'Well, I will be out there in a few days and *we are going to look you up.*'"  
[5 R.T. 683. Emphasis supplied. See Indictment: Counts 5 and 10.]<sup>2</sup>

Carbo's presence in Philadelphia with Palermo was further confirmed by John DeJohn, co-manager for Carmen Basilio, who saw Carbo and Palermo together in a private residence in Philadelphia in April or May, 1959. [44 R.T. 6574-6578.]

Telephone records further reflect that one person-to-person call for Leonard followed by three station-to-station calls were made from the Chicago Stadium to the Hollywood Legion Stadium during business hours on April 29, 1959. [Exs. 40, 41, 42, 44.]

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<sup>2</sup>No toll slip appears in the record reflecting a third call from Philadelphia to Leonard on April 28, 1959. However, a person-to-person call was made from the Felix Corey residence in Philadelphia to "Jack Leonard" at Leonard's home in Van Nuys, California, on the evening of April 29, 1959. [Exs. 9, 19.] The connecting time in Philadelphia was 10:58 p.m. and the call lasted 3 minutes and 54 seconds. [Ex. 20.] However, the telephone company practice in Pennsylvania is to date toll slips en masse after the other information has been filled in, and the operation of dating is performed by persons other than the operators who place the calls and record the other information on the toll slips. [4 R.T. 470-473.] See Appendix A for a chronological chart of toll slip evidence.

On the same day, Gibson received a collect person-to-person call from a party named "Frank" in Philadelphia. The call lasted 5 minutes and 6 seconds. [Ex. 39.] On occasion, Carbo and Palermo had used the name "Mr. Frank" when placing long distance telephone calls. [43 R.T. 6520; 32 R.T. 4693.]

Additional telephone toll slips reflect the following telephone activity during the evening of April 29, 1959:

At 7:20 p.m., Philadelphia time, Palermo made a collect person-to-person call from Philadelphia to Gibson at his home in Chicago. The call lasted 4 minutes and 30 seconds. [Exs. 23, 32.]

According to telephone records, at 10:58 p.m. Philadelphia time, the person-to-person call from the Felix Corey residence to Leonard's home in Van Nuys, previously referred to, was made. [Ex. 20.]

Thereafter, at 11:05 p.m., Philadelphia time, a station-to-station call was made from the Felix Corey residence in Philadelphia to Gibson's residence in Chicago. This call lasted 3 minutes and 8 seconds. [Ex. 25.]

Twenty minutes after Palermo completed this call to Gibson, a person-to-person call was made to "Jackie Leonard" at Leonard's residence in Van Nuys, California, from the residence of William Daly, the unindicted co-conspirator, in Englewood, New Jersey. The call was connected at 11:28 p.m. Englewood time, and lasted 5 minutes and 27 seconds. [Exs. 29, 31.]

At 11:55 p.m., Philadelphia time, another station-to-station call was made from the Felix Corey residence to Gibson's Chicago residence. [31 R.T. 4640, Ex. 24.]



On April 30, 1959, at 10:01 a.m., Chicago time, "Truman Gibson" made a person-to-person call to "Leonard" at Leonard's residence from the Chicago Stadium. The call lasted 6 minutes and 46 seconds. [Ex. 47.]

Thereafter, four station-to-station calls were made during business hours that day from the Chicago Stadium to the Hollywood Legion Stadium: at 11:44 a.m., lasting 4 minutes and 10 seconds [Ex. 43]; at 1:14 p.m., lasting 7 minutes and 42 seconds [Ex. 49]; at 3:51 p.m., lasting 16 minutes and 6 seconds [Ex. 48]; and at 4:09 p.m., lasting 5 minutes and 13 seconds. [Ex. 46.]

Leonard testified that during the days following the death threat calls from Carbo and Palermo, he spoke with Gibson and told him what had happened. Gibson told Leonard to call him if anybody contacted him. [5 R.T. 684.]

About April 29, 1959, the promoters at the Olympic Auditorium withdrew their \$20,000 surety bond guaranteeing the performance of the Hollywood Boxing and Wrestling Club to the California State Athletic Commission. This bond was a condition precedent to the continued existence of the club. [25 R.T. 3638.]

On April 30, 1959, Palermo checked into the Bismarck Hotel in Chicago and charged his stay to "I.B.C., address Truman Gibson, Approved by Chicago Stadium, Ben Bently, Chicago Stadium." [12 R.T. 1731-1732, 1739-1740; Exs. 70, 71.] Palermo frequently charged his stays at the Bismarck to Gibson's firm. [40 R.T. 6002.]

That same day, Gibson admitted, he was on the telephone with Leonard offering to pump additional capital into the Hollywood Boxing and Wrestling Club *if Leonard would persuade Nesseth to sign for a Jordan-Hart title match*. Gibson told Leonard that the fight would be promoted at the Legion Stadium. [31 R.T. 4631-4632. See Indictment: Count 1, paragraphs 3a and 3d.]

Gibson further admitted that he met with Marty Stein, Sugar Hart's manager of record, on May 1, 1959, at the Bismarck Hotel where Palermo was staying. Gibson had discussed matching Hart and Jordan in one of the three telephone calls from Palermo the preceding day. Gibson acknowledged that Palermo joined him and Stein in the lobby of the Bismarck Hotel after lunch and that Palermo and he (Gibson) were both trying to effect a match in which Jordan would defend his title against Hart. [31 R.T. 4641-4643.]

While Palermo was at the Bismarck that day he made three long distance telephone calls. Although the Bismarck had the original toll slips reflecting these calls when the Federal Bureau of Investigation first contacted them during the investigation of this case, and although it was the business practice of the hotel to maintain such records for three years, when the Government served a subpoena duces tecum on an employee of the hotel to produce these records, they could not be located. [12 R.T. 1732-1734.] The Bismarck Hotel is a joint enterprise of James Norris and Arthur Wirtz—Gibson's employers. [36 R.T. 5284-5287; 32 R.T. 4790-4791.] However, the F.B.I. had taken the precaution of photographing these records, and the photographs were received into evidence. [12 R.T. 1734-1735; Exs. 74, 75, 76.]

The calls, all dated May 1, 1959, were as follows: a 2 minute station-to-station call to the number from which Palermo and Carbo had made the threatening calls to Leonard in January and April [Exs. 74, 19, 13, 21, 22, 20]; a 17 minute person-to-person call to "Parnasols" (obviously George Parnassus) at the Olympic Auditorium in Los Angeles [Exs. 75, 162]; and a 3 minute station-to-station call to the Hollywood Legion Stadium. [Ex. 76.]

During the afternoon of May 1, after meeting with Gibson and Stein, Palermo flew directly to Los Angeles. His business was so urgent that he failed to check out of his hotel. [12 R.T. 1726-1729; 40 R.T. 6004; Exs. 70, 71, 73.] Arriving in Los Angeles the same day, Palermo registered at the Beverly Hilton Hotel in Beverly Hills under one of his aliases, "George Tobias". [15 R.T. 2180-2182; 39 R.T. 5857; Exs. 85-A, 85-B, 85-C.] He gave his home address as "110 N. Clark Street, Chicago, Illinois". [15 R.T. 2179; Ex. 84-A.] The building located at this address is the Cook County Building containing the various offices of county government. There are no residences in the area. [43 R.T. 6493-6494; Ex. 144.]

From this time, Carbo's "friends on the West Coast" openly joined the conspiracy.

On the evening of Friday, May 1, 1959, Palermo had a meeting with appellant Dragna at Puccini's Restaurant in Beverly Hills. [40 R.T. 6030-6037; 38 R.T. 5615-5616.] Dragna admitted that Palermo suggested that he (Dragna) contact Leonard. [38 R.T. 5618-5619.] Palermo informed Dragna that the purpose of his trip to Los Angeles concerned Sugar Hart. Dragna told Palermo to call him on Monday, May 4, and pro-

vided him with a telephone number for this purpose. [38 R.T. 5666-5667.]

On Saturday or Sunday (May 2 or 3) [6 R.T. 720; 40 R.T. 6030; 36 R.T. 4984-4988], Leonard received a telephone call from Palermo:

“... He told me he was in Los Angeles and he has got to see me right away; that he is at the Beverly Hilton Hotel; and I tell him, ‘Well, Jesus, it is late,’ it was late at night, I don’t know whether it was 10:00 or 11:00 o’clock, it was quite late and I says, ‘I have the wife and kid here.’

Well, he said, ‘Bring them with you and they can wait in the lobby.’

Well, I told my wife I better go, it’s serious.

And so we went, the three of us, and I left them downstairs in the parking lot, it was a very well lit parking lot and an attendant there, and so they stayed there and I went into the lobby of the hotel and there was Blinky Palermo *with Joe Sica.*” [5 R.T. 684; Emphasis supplied.]

Leonard had met Sica seven or eight times before but had never transacted any business with him. [5 R.T. 685.] Palermo told Leonard he and Sica wanted to talk to him in Palermo’s room upstairs. They took the elevator to the sixth or eighth floor where they sat him down and confronted him as follows:

“... And Joe says, ‘I am surprised at you. You got yourself in a hell of a jam here,’ he said, ‘with good people and doing a thing like this to them.’

And I tried to explain to him that it wasn’t my fault, it wasn’t Nesseth’s fault, it was Tru-

man Gibson's fault, and Truman Gibson had put everybody in the middle when he said he could fix everything up and that he said to go ahead and go along with it, and Joe didn't want to hear anything about Truman Gibson.

\* \* \* \* \*

Joe said, 'Leave him out. We don't want to hear nothing about that Truman Gibson,' and he used a couple of vile words. And the same thing with Blinky, he told me the same thing, he said, 'I don't want to hear anything about Gibson, he has nothing to do with this.' 'You are the man we are holding responsible.' He says, 'I want to hear your story and I want to hear Blinky's'—this is Mr. Sica talking.

So I started to say something. Blinky told me to shut up, so I did. I shut up and told him 'Go ahead and tell your story.'

And he told the story about me telling Carbo that everything was all right.

\* \* \* \* \*

Blinky was telling his story to Sica about my telling Carbo everything is all right and that I was going to go along with it and I told him, then, I interrupted him to try to tell him, 'Jesus, I told you that Truman was in the middle of this thing.'

So he said, 'I told you to shut up and sit down. We are not going to talk about Truman. We are talking about you and your part in this thing.'

*So Joe told me he had been a friend of The Gray for many, many years, meaning Frankie Carbo, and although he knew me and knew of me and knew me, he didn't want to see me get in any*



*bad trouble, that I was in serious trouble and could get hurt or something could happen to me on something like this.*

\* \* \* \* \*

. . . He said that we weren't playing with kids, we were playing with grownup men, and Blinky started shouting, saying that his neck was in the noose, that he couldn't leave California until this thing was straightened out, that he was in real, real bad shape with Frankie Carbo with this mess; that he had stood good for me telling Carbo I was all right, that Truman Gibson was in the middle, because he had said that everything was all right; in other words, it looked like everybody was in the middle except Frankie Carbo.

So Blinky said, 'What the hell are we going to do to straighten this thing out? We got to do something. I can't go home like this.'

I said, 'There is nothing I can do. I just don't know what to tell you. You are going to have to talk to Nesseth.'

Joe Sica said, 'Jesus Christ, get hold of Nesseth.'

I said, 'It is late at night,' I said, 'I can't get hold of Nesseth.'

Well, he says, 'Doesn't he have a phone?'

I said, 'He has got one, but I don't even have the number. Can you see him tomorrow?'

Joe said, '*Drag him in, got out and grab him by the neck and get him out of bed and shake him and get him in line.*'

I said, 'Well, I can't do that.'

He said, 'Can't you whip him?'

I said, 'It isn't a question of whipping him.'

I don't know whether I can whip him or not but I am going on doing business with him again.'

He said, 'Well, look, Jackie, you made a choice. It is a question of either you or Don Nesseth is going to get hurt.'

*He says, 'Look, Jackie, you made a choice. It is a question of either you or Don Nesseth is going to get hurt. Wouldn't you rather go grab him by the neck and straighten him out, than for me to go back and tell "The Gray"? You try it, you are all right, but it is Nesseth that is no good.'*

*'The way it is now,' he says, 'you and Blinky have both got your necks in a sling.' and he said, 'Something has got to be straightened out.' He said, 'If you have to, go out and beat the hell out of Nesseth. If you need any help we will go with you and help you and drag him out of bed.'*

I assured him I wasn't going to do anything like that to Nesseth, that I could get hold of Nesseth in the morning and try to get him to talk to them and see what we could do in the morning.

So with that I got up and edged my way to the door, and Joe said, 'Are you going to see this guy in the morning and straighten things out?'

And Blinky said the same thing, to get it all straightened out.

And I said, 'Well, I am going to try.'

Blinky said, 'Try, hell. You are going to straighten it out. I can't go home like this. I am in a hell of a jam with "The Gray Man".'

With that I told him I would see him in the morning and I went down the elevator and left.

I left Joe and he there together.” [5 R.T. 686-692. Emphasis supplied.]

Leonard was asked if anything was said to him about a fight with Sugar Hart. He testified:

“Well, Blinky said, ‘That is the only answer to the whole problem,’ was for me to convince Nesseth to fight Sugar Hart and that that would straighten things out, as far as Carbo was concerned. And Sica agreed there, too. *He said that I had my head in a noose and that was the only way I was going to get the thing straightened out, was to grab hold of Nesseth and make him take the fight with Sugar Hart.*” [6 R.T. 733. Emphasis supplied. See Indictment: Counts 1, 4, and 5.]

On this same occasion Palermo informed Leonard that Del Flanagan, another ranked welterweight fighter managed by Akins’ manager of record, Bernard Glickman, was controlled by the Carbo group. [6 R.T. 733; 32 R.T. 4783-4787; 29 R.T. 4244-4245.]

At the time of Sica’s unexpected appearance at the Beverly Hilton Hotel, there was neither a business nor a social relationship between Leonard and Sica. Sica’s opinion, interest, or advice were neither solicited nor desired by Leonard. [6 R.T. 720.]

Leonard described his reaction to Sica’s appearance as follows:

“Well, the minute I seen him I remembered what Carbo had told me before about somebody on the west coast taking care of me and for once I was scared, when I seen him.” [6 R.T. 721.]

Then Leonard explained why Sica's presence with Palermo frightened him:<sup>3</sup>

"Well, by reputation I had always known of Joe Sica as an underworld man and a strong-arm man."  
[6 R.T. 722.]

On Sunday, May 3, 1959, Nesseth met Leonard and McCoy at the Hollywood Legion Stadium, and Leonard placed a telephone call to Gibson's home in Chicago. The call was connected at 1:30 p.m., Los Angeles time and lasted nineteen minutes and four seconds. [Ex. 17.] Nesseth testified:

"I called—I believe Jack made the call to Truman and I talked to him and I told him that—of the threats that had been made to us and of the harassment that we were constantly under, and that I wanted him to call his boss and to call off the dogs. Those were my words.

And he said, 'When you say my boss, you mean Mr. Norris?'

And I said, 'Of course, I mean Mr. Norris;' that if he didn't call Norris and have these people out of town and leave us alone, that I was going to call his—the sponsors of the television shows and tell them just what kind of people they were dealing with.

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<sup>3</sup>Leonard and Nesseth's testimony with respect to this essential element—fear—in an extortion case was carefully reviewed in advance with the Court, out of the hearing and presence of the jury. The Court was advised by Government counsel that the victims' testimony concerning Sica's and Dragna's reputation would be circumscribed so that their full knowledge thereof and the basis in fact therefor would not be disclosed to the jury. Long in advance of trial, the Government briefed this problem for the District Court. [6 R.T. 706-707, 716; I C.T. 356-366.]

[A]nd Truman said, 'Well, I am not threatening you.' And I said, 'No, you have never threatened me, but these other people are and if it isn't settled, I am going to make these phone calls.'

*Truman said, 'Well, all the pressure can be relieved and you can also do your own Jackie Leonard a favor by saving his Club, if you will just agree to fight Sugar Hart.'*

And I told him they could forget that, because I had better things in mind and I wasn't going to fight Sugar Hart.

We must have talked for probably 15 minutes and Truman agreed that he would call Norris and see what he could do about getting these people out of town." [13 R.T. 1830-1831. Emphasis supplied. On cross-examination Gibson substantially corroborated Nesseth's version of this telephone call. [32 R.T. 4684-4692.]

The next morning, Monday, May 4, 1959, Nesseth went to Leonard's office at the Stadium. [6 R.T. 727; 13 R.T. 1831.] Leonard informed him that Palermo wanted to see him that afternoon at Leonard's office. [13 R.T. 1832-1833.]

Leonard told Nesseth about the session that weekend at the Beverly Hilton Hotel with Palermo and Sica and that he had been told to pass on the following message to Nesseth:

*"The message was that I had to get in line and straighten this thing out, that we're in bad trouble and if I wanted to ever do anything in boxing, I better get in line and sit down and straighten it out with them."* [13 R.T. 1836, 1842. Emphasis supplied.]



While Nesseth was in Leonard's office on May 4, Nesseth testified:

" . . . Blinky Palermo and Louie Dragna walked in, and Blinky said, 'I want to talk to you.'

And I got up and said, 'Well, I don't want to talk to you,' and I walked out." [13 R.T. 1833.]

Nesseth had never met Dragna before that moment nor had he had any business with him. [13 R.T. 1833.] As he left the room, Nesseth made up his mind to call the authorities. [13 R.T. 1834-1835.] Upon leaving Palermo and Dragna with Leonard in Leonard's office, Nesseth contacted the authorities. [13 R.T. 1835-1836.]

The following day Nesseth was given police protection by the Los Angeles Police Department. He was asked to describe his state of mind prior to receiving this protection:

" . . . I was in fear that there—there may be attempts to carry out the threats that had been made.

As I have testified, I had called Truman Gibson and asked him to do what he could to get rid of these people that were bothering us, and the next day, which was Monday, Leonard told me he had a meeting the night before with Palermo and Sica. That afternoon I am confronted by Louie Dragna, or his presence was there in the room when Blinky wanted to talk to me.

These people had no reason to want to talk to me. They had nothing to do with boxing. I knew them by reputation and I knew . . . that the threats had been made on numerous occasions, and one of them had been Carbo had friends out on the

Coast. Inasmuch as these people had no connection with boxing, I had reason to be afraid for my physical person.” [13 R.T. 1864-1865.]

Nesseth was asked what he knew of Sica by reputation. He testified:

“I knew Sica by reputation only as being an underworld figure.” [13 R.T. 1865.]

The same question was put to Nesseth with respect to Dragna. He testified, “The same.” Then he explained that he meant:

“[T]hat he was an underworld figure, in my opinion.” [13 R.T. 1865-1866.]<sup>4</sup>

Leonard testified that he recognized Dragna as he entered his office with Palermo on the afternoon of May 4, 1959, and that Nesseth immediately got up and left:

“And Blinky Palermo said something to him about, ‘Come on, I want to talk to you,’ and Nesseth just kept going, he didn’t stop.” [6 R.T. 728.]

Leonard continued with the events that followed Nesseth’s departure as follows:

“Well, Blinky says, ‘Jesus, I want to talk to the fellow.’ [Referring to Nesseth.]

I said, ‘Well, you are going to have to get with him and sit down and talk to him.’

He says, ‘How in the hell am I going to do that? What am I going to have to do, grab him and shake him and set him down?’

I said, ‘I don’t know how you are going to talk

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<sup>4</sup>See footnote 3, above.

to him. No use talking to me. You are going to have to talk to Nesseth.'

He said, 'I want to talk to you a little while.'

And he and Dragna sat down and I started telling them about Truman, he should see Truman and not me.

He said, 'No, I want to talk to you. Leave Truman out of this.'

He turned to Mr. Dragna and said, 'I want you to hear this.' And he started explaining about that I was supposed to pay 15 per cent of the Jordan purse and he said, 'Jesus Christ,' he said, '*I even have had to tell "The Gray Man" he was going to get 15 per cent. What do you think of that?*' He said, 'He put me in the middle with him, too. What do you think of that?'

*Dragna says, 'Well, you are wrong there, Jackie.'*

And then Blinky went on to explain the whole thing, that he thought that I should get Nesseth to get Don Jordan to fight Hart, who he had control of, or he had told me he had control of.

And I told him, well, I didn't think under any circumstances he was going to fight Hart.

And he says, 'Well, how about Flanagan? You mentioned Flanagan at the hotel.'

I told him, 'I don't think he will fight anybody that you fellows are connected with, the way you are putting it now.'

He says, 'Well,' he says, 'he is going to have to do something because I am really in trouble and I got to straighten this thing out.'

He turned to Dragna and he says, 'What do you think of it?'

*Dragna says, 'Well, you are wrong, Jackie. You are dealing with big people and your word should be your bond.' He says, 'After all, if your word is no good, then you are no good in this game. Everything is dealt—you are dealing with real nice people and big people, and if your word is no good you are no good in this game.'*

I said there was nothing I could do about it, that Truman Gibson had put me in the middle. He said everything would be all right and he would fix things up when he got back East, and he just didn't do it.

Palermo started screaming and hollering at me, that it was me they was looking to, that they didn't give a dam [sic] about Truman Gibson, they didn't make any arrangements with him. That Truman had turned it over to me and I had made arrangements and I was the man and that was it.

*In the conversation Mr. Dragna asked me if Don Nesselth didn't live out his way.*

I said, 'Well, I think he lives out somewhere near San Bernadino.'

*He said, 'No, it is West Covina, isn't it?'*

I said, 'Yes, I guess it is.'

*In the conversation he said, 'He has a wife and kid, doesn't he?'*

I said, 'Yes, he has a wife and a boy.'

And Palermo started screaming again that *something had to be done to get hold of Don Nesselth and straighten this thing out, if I had to grab him and shake him and get him in line, to sit down and talk to him.*

I said nothing like that was going to happen. I said, 'If Don wanted to talk to you, all right.' If he didn't, there was nothing that could be done about it, that Don had complete charge of the fighter and there wasn't nothing anybody could do.

He said, *'Well, we have to make this Hart fight. At least, if I can go back and tell "The Old Man" —meaning Frank Carbo—tell him I have the Hart fight, that will take a lot of pressure off. I can tell him you tried and I tried and at least we have something accomplished.'*

He said, 'I am going to leave,' and he said, 'I want you to make sure things are taken care of.'

*Dragna told me, he says, 'You are right in the middle of this thing, Jack.' And he said, 'You better try to get it straightened out or,' he says, 'you can be in a lot of trouble.'* [On May 6, 1959, Palermo admitted, in a recorded conversation that Dragna had said he had heard Leonard was "going bad." Exs. 97, 96-A for Ident. at pp. 36-37.]

And Blinky told me that for me to get hold of Nesseth and that he would call me later, and that was about the extent of that conversation." [6 R.T. 728-732. Emphasis supplied.]

As Leonard put it, Dragna said "he was acquainted with these people." In the context of the conversation, according to Leonard, "these people" connoted "Carbo and Truman Gibson and Blinky." [12 R.T. 1700.]

Although Dragna contended he had gone to the Legion Stadium to discuss with Leonard whether he should purchase a fighter named Toluca Lopez [38 R.T. 5627], Leonard testified that *nothing* but the demands of Carbo



and Palermo with respect to Jordan's future was discussed. Leonard had never had any business relationship with Dragna, and Dragna's views on the extortive demands of Palermo and Carbo were neither solicited nor desired by Leonard. [6 R.T. 733-734; 11 R.T. 1518.]

Dragna admitted on the witness stand that when he entered Leonard's office (1) he knew Palermo would be there expecting him [38 R.T. 5622, 5678], (2) that Leonard was talking to Nesseth when he arrived and Nesseth departed without talking to him [38 R.T. 5681-5684], (3) that the Hart fight was discussed between Palermo and Leonard in his presence [38 R.T. 5691], (4) that he said that Nesseth lived in his neighborhood in West Covina [38 R.T. 5695-5697], (5) that Palermo said that Leonard owed him money in connection with a fighter and that he (Dragna) ventured the opinion to Leonard that Leonard was wrong in this transaction [38 R.T. 5699-5701], (6) that none of this was any of his business [38 R.T. 5702], and (7) that he expressed his opinion that Leonard was wrong when Palermo requested his views. [38 R.T. 5702.]

Leonard was asked what his reaction was to Dragna's appearance in his office on May 4, 1959:

"Well, the same thing, I thought of Mr. Carbo right away, what he told me, he was going to have somebody on the West Coast come out there. Although I didn't know Mr. Dragna, by reputation I always heard he was connected with the underworld." [6 R.T. 734.]<sup>5</sup>

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<sup>5</sup>See footnote 3, above.

Also, on the day of Dragna's visit, pressure on Leonard was further increased when Underwood sent a five day notice of lease termination to the Hollywood Boxing and Wrestling Club and notified the firm which had posted a \$20,000 penal bond for the Club (when the Olympic Auditorium cancelled its bond) with the California State Athletic Commission that Hollywood Post 43 was withdrawing its \$20,000 in Government bonds held as security for the penal bond. [32 R.T. 4661.]

On the evening of the same day, Leonard received a number of telephone calls at his home from Palermo and Sica, in which they told him to come to a restaurant where they were waiting for him with Dragna and George Raft to see if they "couldn't sit down and straighten this thing out." [6 R.T. 736-737.]

At 12:06 a.m., Tuesday, May 5, 1959, Gibson telephoned Palermo at the Beverly-Hilton Hotel from his home in Chicago. [Exs. 34, 85-A, 85-B, 85-C.] The call was made person-to-person to Palermo under his alias "George Tobias". The calling party gave the correct room number for Palermo: Room 663. The conversation lasted twelve minutes and thirty seconds. Gibson admitted that he told Palermo on the telephone that he should get out of town because of what Leonard had related to him in his call on May 3. [31 R.T. 4647.]

On or about May 5, Gibson also telephoned Daly in New Jersey and arranged to meet with him in Los Angeles on May 11, 1959, to handle the crisis at the Legion. [32 R.T. 4662-4663.]

During the day of May 5, 1959, Leonard visited the offices of the Los Angeles Police Department. [6 R.T.

737-738.] Early that evening he was escorted by Sergeant Conwell Keeler of that Department to his home in Northridge. With Leonard's consent, Keeler connected a tape recording machine via an induction coil to Leonard's telephone receiver. [44 R.T. 6708-6711.] Exhibit 177 is a tape recording made by Keeler when Leonard received a call from Palermo that evening. The full text of that recording was read into the record during the Government's closing argument. [49 R.T. 7547-7554.]

Leonard told Palermo he could not persuade Nesseth to have his fighter, Jordan, meet Sugar Hart, but that Nesseth seemed interested in a proposed Jordan-Flanagan fight. Palermo said: "That's very good. That will get you and I off the hook." (Flanagan had the same manager as Akins, Bernard Glickman.) [Ex. 177; 29 R.T. 4244-4245.]

Palermo then told Leonard that he had "an appointment to call Truman [Gibson] with you." Palermo suggested that Leonard meet him at "Perini's" (meaning Perino's Restaurant) for this purpose. Leonard demurred on the ground his wife's sister was in the hospital. Palermo said Leonard should take a cab to Perino's after his wife arrived home. Leonard stalled, saying he did not want to leave his wife alone, at which point Palermo declared: "What the hell are we going to do? I've got to get a hold of Truman [Gibson] with you", and that "I just got a message from our friend." [Ex. 177.]

Palermo told Leonard during this conversation that they had to get hold of Gibson by 12:00 o'clock that night and that, "You've got to be with me. I've got to tell you what to say." Palermo became more insistent

and told Leonard that he had to be there: "You have to make it." Palermo warned Leonard: "Don't mention no names", and repeated that, "I've got to tell you what to tell him." Palermo advised Leonard: "Joe's [Sica] going to be here at 9:00 o'clock." [Ex. 177.]

Palermo told Leonard that Daly and Gibson were going to take the Hollywood Boxing and Wrestling Club out of Leonard's hands. Palermo was concerned over Leonard's state of mind and told him that, "We're not—I'm not hostile with you." Then, admitting his own knowledge that Leonard's wife was frightened by the threats which had transpired, Palermo stated: "Tell your Missus that." Palermo said: "We got our neck into something", to which Leonard rejoined, "The telephone call I got the other day [referring to the death threats of April 28] they was hostile. They were really screaming at me", and Palermo started to explain but changed his mind: "But the son-of-a-bitch—he had no right—oh, I didn't mean that, that don't mean nothing—on the phone, that don't mean nothing." [Ex. 177.]

The next morning, May 6, 1959, Leonard found Sica waiting for him at the Legion Stadium. Sica wanted to know if Leonard had made contact with Nesseth and McCoy and whether he had "got this thing straightened out yet." [16 R.T. 738-739.] Nesseth and McCoy arrived and were introduced to Sica by Leonard.

When Sica entered the room he was described by three witnesses to have surveyed the room in a suspicious manner as if looking for a concealed listening device. [16 R.T. 745-746; 13 R.T. 1848-1849; 15 R.T. 2121-2122; 17 R.T. 2457-2458.] One witness, Sergeant Boyle of the Los Angeles Police Department Intelligence

Division, testified that Sica even went to the extreme of backing out of Leonard's office in order to inspect the walls of the hallway and the door frame. [17 R.T. 2457-2458.] The ensuing conversation among Leonard, Nesseth, McCoy and Sica, later joined by Palermo, was recorded by officers of the Los Angeles Police Department with the aid of a microphone concealed, with Leonard's permission, in his office. [16 R.T. 2337; Exs. 96, 97; Ex. 96-A for Identification.]

Sica began the meeting by insisting that Nesseth make a decision so that Palermo could leave town. [Exs. 96, 96-A for Ident. at p. 1.] Nesseth reminded Sica that phone calls had been received from New York and that they had only one or two days more in which to save Leonard's "neck". [*id.* at pp. 1-2.]

Apparently satisfied that no outsiders were present, Sica arranged by telephone to chauffeur Palermo from the Beverly Hilton Hotel to Leonard's office. [*id.* at pp. 4, 8.] When Sica returned with Palermo, Palermo asked Nesseth whether Leonard had advised him of the details of the arrangement concerning Jordan. Nesseth acknowledged that he was aware that a 15 per cent commitment had been discussed between Palermo and Leonard, but that he (Nesseth) had turned it down. [*id.* at pp. 11-12.]

Sica purported to summarize his understanding of the Leonard-Nesseth-Jordan relationship, basing his summary upon meetings with Palermo and Leonard in the last few days. After tracing Jordan's ascendancy to the welterweight crown, Sica claimed that when Jordan got "a title shot . . . [Leonard] dealt with some other people, and by dealing with these people, there were certain commitments was made. . . ."



Then Sica said:

“Now, when you fellows got lucky and you won the title, there were certain things that were supposed to be fulfilled. . . .” [*id.* at pp. 13-14.]

One of the *things* that Palermo and Sica claimed that Nesseth and Leonard *were supposed to fulfill* in return for Jordan’s chance to win the welterweight title was a commitment to defend his title against Sugar Hart or Del Flanagan. Nesseth replied that he was not going to have Jordan defend his title against anyone but Moyer, a bout for which contracts had already been drawn. [*id.* at pp. 14-15.]

Then Nesseth explained that he had worked hard for more than two years, grooming Jordan for the title. Palermo interrupted him and asked: “Well, do you think you got the title fight on your own?” Nesseth replied, “Yah, I think I got—I think I got the title fight. As far as I’m concerned, I got it on my own.” Palermo’s rejoinder was: “You did like fun get it on your own.” [*id.* at p. 16.]

Palermo admitted that he had told Leonard in a telephone call that there would be no title fight. [*id.* at pp. 17-18.] He further admitted that he had told Gibson in Chicago that there would be no fight in Los Angeles until he had been assured by Leonard that Leonard was “the boss of the fighter.” He further acknowledged the accuracy of Leonard’s description of the two telephone conversations between them on October 23, 1958. Palermo even revealed that Gibson had told him in Chicago to make his first telephone demand upon Leonard on October 23, 1958. [*id.* at pp. 19-26.]

Palermo repeatedly attempted to persuade Nesseth to admit that Leonard was wrong in assuring him that Leonard was Jordan's boss rather than Nesseth:

“Palermo: Well, I'm asking you, I'm asking you an honest question. Do you think it was right for him to inform me like that?

Nesseth: I'll tell you the truth. I'm a square. I think it was as right as it was for you to demand half the fighter.” [*id.* at p. 26.]

As the argument progressed Palermo alluded to Leonard's meeting with Carbo in Florida:

“Palermo: Let me tell you something; you made that commitment in front of someone else, too, you know; that you were the boss.

Leonard: I didn't even talk to him until way after the fight. That was after the fight.

Nesseth: Who else did you talk to about the fight?

Palermo: He knows who he talked to. . . .”  
[*id.* at p. 29.]

Continuing the argument over the *propriety* of Leonard's assuring Palermo that he was Jordan's boss in order to avoid cancellation of the title fight set for December 5, 1958, Nesseth and Leonard explained to Palermo and Sica that Leonard was acting under instructions from Gibson who controlled Leonard's fate as a promoter. [*id.* at p. 27.] Palermo objected to these statements: “Truman don't think like that, Jack. We don't think like that.” Then Sica chimed in: “We didn't see what Jackie was trying to do. . . .” [*id.* at p. 31.]

Still later, an oblique reference to Dragna was made when Leonard objected to Palermo's bringing: "the other guy in. What the hell did you bring him in here for?" At first Palermo indicated ignorance of the person to whom Leonard was referring. Sica took offense at the remark, inferring that Leonard was referring to him:

"Sica: . . . You feel there's some type of repercussions by me coming in here?

Leonard: Oh, no—I was just wondering.

Sica: I came in here as a friend to you to see that you get straightened out.

Palermo: That's a very bad remark to make to a guy, a friend of yours for twenty years.

Leonard: . . . [Unintelligible] that was the other guy.

Palermo: I didn't know the other guy.

Leonard: . . . [Unintelligible] story.

Palermo: I don't know the other guy who told me. He didn't say nothing.

Leonard: He sat there when you told him—

Palermo: *He talked to you and he said he heard you were going bad, that's all he said. . . .* [Unintelligible.]” [*id.* at pp. 36-37. Emphasis supplied.]

Sica and Palermo persisted that Nesseth agree to a Jordan-Hart fight to "take everybody . . . off the spot." Sica pointed out that "Truman and Jackie are the guys on the spot." Nesseth replied: "There's only two ways it can be solved right. One way is you guys can control the fighter, the other way is I fight Hart. Either one of them aren't actually very attractive to

me. I don't see where I gain anything by either one." [*id.* at pp. 44, 47.]

Nesseth continued to blame Gibson for Leonard's assurance to Palermo that he was Jordan's boss, pointing out that Gibson was the first person to tell Palermo that everything was arranged with respect to the Jordan title fight. Palermo replied that he "never took his [Gibson's] word for it." [*id.* at p. 55.]

Palermo stated that he had wanted to be in California on October 23 in order that he could handle Nesseth himself, but that Gibson had told him "Jim [apparently James D. Norris] says, 'It's better that you don't go out there,' " and that Gibson assured him that he would "handle everything. . . . So he told he [sic] handled everything. But we [apparently Carbo and Palermo] didn't take his word for it. . . ." Palermo then explained that this was why he returned to Chicago. [*id.* at p. 56. A description of what happened when Palermo returned to Chicago in November of 1958 and told Gibson that he had a part of Jordan's contract is set forth above in this section.]

Nesseth called Palermo's attention to the recent threatening telephone calls and Palermo replied by explaining the connection between the threats from him and Carbo and Gibson's financial pressure upon Leonard:

"Nesseth: I'd like to make one thing clear right now, that I don't think all these phone calls and all this harassment are necessary, do you?

Palermo: No, no, I don't agree with that. I don't agree with that. I don't agree with that at all. You're right. That's out. There ain't going to be no harassment, that's out of the question.

*There never was going to be any, but see where the heat and this comes in, Jack. . . .”* [*id.* at pp. 58-59. Emphasis supplied.]

A moment later Nesseth pointed out to Palermo that Leonard was going to be evicted from the Hollywood Legion Stadium on Friday at midnight. Palermo replied: *“It don’t have to happen if we can get things ironed out . . . [Unintelligible], I can go to bat and see that he gets it in a second. He knows that. I told you that, didn’t I?”* [*id.* at pp. 59-60. Emphasis supplied.]

Sica impressed Leonard with the gravity of his situation:

“Sica: Well, let’s go, Frank. Jackie, you got yourself in a hell of a spot with this thing. It’s terrible. How could you let people doublecross other people? That’s all it is.” [*id.* at p. 68.]

The theme recurred:

“Sica: Dan, you are in a hell of a spot with these people.” [*id.* at p. 68.]

As the session drew to a close, Palermo changed the subject and asked Nesseth whether Nesseth had told anyone about Palermo’s visit at the Kingsway Hotel in St. Louis the day after the Jordan-Akins fight in April, described above:

“Palermo: See what I mean? Did you tell anybody about the St. Louis thing at all?

Nesseth: Tell anybody what?

Palermo: About I was in St. Louis with you?

Nesseth: Sure. I didn’t tell anybody, they told me.



Palermo: Who's that?

Nesseth: People.

Palermo: People told you that? How in the hell would they know it?

Nesseth: Well, it's a guy came up to my room five minutes after you left.

Palermo: Who was that?

Nesseth: A cop.

Palermo: *Oh, a cop?*

Nesseth: Yah.

Palermo: *Did you tell him what we talked about?*

Nesseth: Yah, I told him what we talked about.

Palermo: *You told him about the fifteen per cent, too? You didn't tell him about the fifteen per cent, did you?"* [*id.* at p. 70. Emphasis supplied.]

As Sica and Palermo were leaving, Leonard testified that Sica had made a point of approaching Leonard who was still seated, leaning over and, in an ominous voice said, "Jackie, you're it." [6 R.T. 745.]

Nesseth testified that he saw Sica lean over Leonard who was seated at his desk. ("[H]e just leaned over and said it in his ear.") [13 R.T. 1849-1850.]

As Sica entered the hallway outside of Leonard's office he stopped and spoke with Salvatore Casarona, also known as Tom Stanley, a fight manager called as a defense witness by Sica. [20 R.T. 2851.] Five minutes later, Stanley came back to Leonard's office and related to Leonard the following threat from Sica:

"Leonard: He told me that Sica had called me a young punk and that I wasn't going to get away

with this thing, that I had doublecrossed everybody in the boxing business and I was bound to get hurt.

And then he went ahead and told me that—Tom gave me some advice and told me I shouldn't be doing this, I should tell Nesseth and McCoy to go to hell because Carbo and Blinky and Sica and these fellows could help me a lot and keep the Legion open, and that I was going to lose it. That all that Nesseth and McCoy would do was to cause me to get into a lot of trouble and get myself hurt.” [43 R.T. 6356-6357; 20 R.T. 2852; 37 R.T. 5564.]

Under cross-examination, Sica tried to explain away his visit to Leonard's office that morning as an effort to find out why Leonard had not come to Perino's Restaurant the night before. [37 R.T. 5495-5498.]

Within hours of Sica's and Palermo's departure from Leonard's office, Manuel Dros, Leonard's assistant matchmaker, received a telephone call from Willie Ginsberg. Ginsberg told Dros to call Sica from a public telephone. Ginsberg provided the number. Dros went to a public telephone and called Sica.

Sica asked Dros if he knew when Chargin would be arriving in Los Angeles, that “Chargin had an obligation toward him.” Sica also wanted to know where Chargin would be staying and the telephone number at which he could be reached. Then Sica told Dros, an employee of Leonard's, that he “was working for the wrong people.” Dros replied “. . . they employed me and I was grateful, that I would try to find out the information so desired, to give me a call at my home that night.” [15 R.T. 2204-2206, 2210; 37 R.T.

5559-5564.] Sica called Dros at his home at about 7:00 p.m. and Dros told him that he had been unable to get the information. [15 R.T. 2207.]

At the time of this conversation, negotiations were in progress for Chargin to become a partner in the Hollywood Boxing and Wrestling Club. The negotiations had been reported in the newspapers. [15 R.T. 2209.] Prior to this day Dros had never had any business or social dealings with Sica. [15 R.T. 2210-2211.]

At approximately 11:55 p.m. the same night, Palermo was questioned by Captain James D. Hamilton of the Los Angeles Police Department. In answer to Captain Hamilton's questions, Palermo stated that he was in Los Angeles on a social visit, that his trip did not have any business purpose; that he had never heard of "Louie Dragna"; and that he had not seen the "Sica boys" during his stay and only knew them "to say hello to." [42 R.T. 6212-6218. Of course, Palermo had been with Sica only hours before and with Dragna two days earlier—on both occasions in Leonard's office. He had also been with Dragna on May 1 in Puccini's Restaurant and with Sica on May 2 or 3 at the Beverly Hilton Hotel and on May 5 at Perino's Restaurant.]

On May 7, 1959, Leonard had a telephone conversation with Gibson. Leonard testified:

" . . . He told me to tell Nesseth that he had taken care of the matter he had talked about, that Jimmie had told Palermo to get out of town, that they didn't operate that way, and he asked me if I wanted anything further on the Hart matter, on the Hart fight. And I said, 'No, there is noth-

ing' they could do with Nesseth on it and he said, *'Well, it's too bad, I could have saved the Club if I could have made that fight, then he could have given me money to have saved the Club.'*

Leonard made a memorandum of this conversation while he was talking with Gibson. [12 R.T. 1691-1694; Ex. 69 for Ident. Emphasis supplied.]

At 1:42 a.m., May 11, 1959, Daly placed a station-to-station telephone call from his home in Englewood, New Jersey to the residence of Margaret Dougherty, about 100 miles to the south in Upper Darby, Pennsylvania. [Exs. 30, 167, 100-102, 176, 101-A for Ident. at pp. 46-47; Exs. 28, 52; 4 R.T. 487-488; 5 R.T. 651, 654; 39 R.T. 5890.] The call lasted 10 minutes. During this conversation Daly spoke with Carbo. Daly told Leonard in a tape recorded conversation three days later that Carbo arranged to meet him later that morning. The meeting was scheduled for a place situated about 40 or 50 miles from each house. [Exs. 100-102, 176, 101-A for Ident. at pp. 24, 46-47.]

At 9:15 a.m. that same day, Daly and Gibson departed for Los Angeles from New York International Airport on Trans-World Airlines Flight 5. [Exs. 156-160, 166; Exs. 100-102, 176, 101-A for Ident. at p. 24; 43 R.T. 6323-6330; 44 R.T. 6554-6555.] Gibson admitted that he requested Daly's presence on this trip. [32 R.T. 4662-4663; 23 R.T. 3404-3405.] Upon arriving in Los Angeles they went to the Ambassador Hotel where Daly checked in at 1:12 p.m. Daly's ensuing stay at the Ambassador until 1:34 p.m., May 22, 1959, was charged to Gibson. [32 R.T. 4666; Exs. 91-A, 91-B, 91-C.] Gibson obtained quarters at the

same hotel for the day and met there with Underwood, Ogilvie, and Daly. Gibson telephoned Leonard at the Cesar Hotel in Tijuana, Mexico, and told Leonard that he wanted to see Leonard "to straighten all this mess out." Gibson told him that he had to leave Los Angeles and that he was leaving Daly there to talk with Leonard, and he (Gibson) would return in one week. Gibson checked out of the Ambassador Hotel that evening at 8:42 p.m. and returned to Chicago. [6 R.T. 750-751; 32 R.T. 4666-4669; Exs. 90-A, 90-B.]

One evening that week, Daly, Parnassus, and Underwood met with Sica at Dorando's Restaurant in Hollywood. This restaurant was owned by the father of Joey Dorando, a witness called by the defendant Sica during the trial. Parnassus, who had known Sica for twenty years, introduced Sica to Daly and Underwood. [28 R.T. 4106-4113; 26 R.T. 3720-3722; 21 R.T. 2994; 22 R.T. 3140.]

Leonard returned to Los Angeles from Tijuana on May 12, 1959. On May 13, Daly visited him at the Hollywood Legion Stadium. Leonard's office was still wired for sound and police officers were in attendance. Daly indicated to Leonard, however, that he did not wish to talk with him in his office but out in the deserted reserved seat section of the auditorium, to which they adjourned. Leonard related their conversation as follows:

"Well, Mr. Daly told me I was in a hell of a jam in two ways, he said, with the Club, what Nesseth had done in going with Cus D'Amato and myself doing the same thing. He told me—

I told him that I didn't have anything to do



with it, I didn't know anything about it except what I read in the papers. I hadn't discussed it with Nesseth.

And he said, *'Well, you are in a hell of a jam.'* And he said, 'I don't know what I can do for you.' He said, 'You have got the whole East upset.' He said, 'Everybody is blaming everybody else. Norris is upset, Gibson is upset, and Carbo is upset, and Palermo is upset.' He said, 'You have got the whole dam [sic] works upset.'

I told him there was nothing I could do about it.

He said, 'What are you going to do with the Club?' *He said, 'You owe Truman that money on the advance.'*

I said, 'I just don't know, Bill. I am disgusted with boxing. I guess I am through with boxing so far as that is concerned.' I said, 'Without these people you can't get anywhere with boxing, anyhow. I will probably get out of it. Anybody can take the Club over. I was talking to Nesseth and a few people about taking the Club over, and if they want to retain me as a matchmaker, all right, and if not, I will just get out of boxing. I have had my fill of it.' That I didn't care what happened to the Club now, I had lost it, anyhow.

He said, *'Well, that is not the only mess.'* He says *'What are you going to do about Nesseth?'* He says, *'After all, these people look to you back there.'* He says, 'You should have come to me in the first place. If you hadn't went to that dam [sic] Blinky,' he said, 'I could have saved Nesseth a lot of money.' He said, 'If you had came to me,' and he said, 'I was your friend,' he says, 'and I

would have went to Carbo and you wouldn't have had to give any money, unless it was a real big fight.' He said, 'I would have told them I was getting the 15 per cent and let Nesseth keep it.' But he says, 'You went to that Blinky,' and he says 'he will take anything to stay out of Carbo's pocket.' He says, 'Carbo had to throw him the chicken feed.' He said, '*Now you are in a hell of a mess.*' And he said, '*I just don't know how I can straighten this thing out.*' He said, '*I doubt if I can.*'

He said, 'Carbo is really boiling.' He said, 'When I left back there I talked to him a couple of nights before, and he said, 'he is real upset about this situation out on the Coast.' [See Exs. 30, 100-102, 176, 101-A for Ident. at pp. 24, 46-47.]

Bill said he had to leave then and for me to come over to the hotel the following morning and see him. He said to just give him a buzz in the lobby and I could come up to the room if there wasn't anybody there. He said to try to think about it and see if I could get hold of Nesseth, to get Nesseth to sit down and talk to him.

*He said, 'I would like to straighten the thing out.' He said if he could straighten Nesseth out, that maybe he then could go back to Carbo or Norris and get the money to put the Club back on its feet. And with that he said, 'See me in the morning,' and that was about the extent of it.'* [6 R.T. 751-754. Emphasis supplied.]

At 9:00 a.m., May 14, 1959, Leonard went to the office of the Intelligence Division of the Los Angeles Police Department where certain technical equipment

was installed upon his person. In a shoulder holster on the left side of his body, Leonard was fitted with a P55 Minifon, a wire recording device. [16 R.T. 2339-2341; 44 R.T. 6696-6697; Ex. 100.] As a precaution, however, the police strapped a portable radio transmitter to Leonard's right side under his arm. The transmitter switch was taped in the "on" position. It could only be received by a special radio receiver tuned to the same frequency which was kept in the possession of Sergeant Conwell Keeler of the Police Department. Sergeant Keeler took steps to make an independent recording on a tape recorder by connecting it to his radio receiver. Leonard then kept his appointment at Daly's room at the Ambassador Hotel while Sergeant Keeler took the radio receiver and tape recorder to a nearby room at the hotel where he established a listening post in order to record Leonard's ensuing conversation with Daly. The independent recordings of the same conversation are in evidence. [44 R.T. 6695-6703; Exs. 100, 176.] Exhibit 101-A for Identification is a substantially accurate transcript of these recordings. Exhibit 101 is a tape recorded copy of the Minifon wire, Exhibit 100, which has been filtered to eliminate distracting background noises. [16 R.T. 2360.] Exhibit 102 is another tape recorded copy of Exhibit 100 which has been edited by erasing obscenities. [16 R.T. 2372-2373.] Certain portions of this conversation were not played to the jury, at the request of the Government and with the consent of the defense, because they contained references to the fact that Carbo was a fugitive in May, 1959, and that Palermo was awaiting trial in Los Angeles on a petty theft charge. [16 R.T. 2287; 17 R.T. 2514-2517; Ex. 101-A for

Ident. at p. 11, line 22-p. 12, line 24; p. 46, line 15-p. 47, line 6; p. 48, lines 4-27.]

Toward the beginning of the conversation, Leonard referred to Carbo's recent threatening calls and Sica's attempts to intimidate him and his business associates, *e.g.* Don Chargin. [Exs. 100-102, 176, 101-A for Ident. at pp. 2-3, 5-6. ] Then Daly began to explain to Leonard why Nesseth and Leonard were in trouble:<sup>6</sup>

"Daly: You see, if this geezer, this Nesseth, he shot his mouth off.

Leonard: Is that right?

Daly: He took the attitude instead of using the same diplomacy he handles when he sells automobiles, used the same fucking bull shit with them, and went along with Truman to bull shit them, you know what I mean, work it out, con them and win them over on his side. He'd 've had them eating fucking gravy to juggle opponents, did this, done that. Now he just challenged them and said, 'Go and fuck yourself. You ain't going to have nothing. You ain't going to have no money. You ain't going to have no this, you ain't going to have that.' Somebody must have made some kind of fucking promise. He wants to act as if he don't know anything about it. That's what's killing them. They're not stupid altogether. Jesus Christ, there was—he knew about it. He played possum until he got the title. They know he done

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<sup>6</sup>The excerpts of this recorded conversation which follow have been printed without deletion of the obscenities appearing in the original recording for the reason that such editing would destroy the full impact and dilute the meaning of Daly's remarks.

it. They know he fucked them. If he had said before the fight, 'No,' but make the speeches you're making now, make them before the fight, but he don't know, he's living in a world of his own, this kid is, and he's daffy, he don't care for nobody concerned. . . ." [Exs. 100-102, 176, 101-A for Ident. at pp. 6-7.]

Then Leonard referred to Daly's intimidating remarks made the previous day at the Stadium, and Daly acknowledged them:

"Leonard: You see the only thing, like you said yesterday, Bill, you know they are not going to let anybody get away with this shit because all the champs will be doing the same God damn thing.

Daly: That's right. Fuck him the same way. It's the way this guy done it, see.

Leonard: I mean then they would lose control altogether.

Daly: Yeah, but I know what their move will be. They won't hold you. *I know what they will do. They are trying to harass you in order to make him come in line.* So if he don't come in line, they know at least, if I'll get word to them, at least you have talked to the guy, the guy just don't want to—he's just stubborn and he don't wanna, he's stubborn and he says that . . . [Unintelligible] . . . That's what I'll tell them cause he said that. Let them take their best shot at them . . ." [*id.* at pp. 8-9. Emphasis supplied.]



Daly explained the effect of Nesseth's refusal to accede to Carbo's and Palermo's demands upon Gibson:

"Leonard: I hear Truman's really in a jackpot over this bullshit too.

Daly: Oh terrible. He was highly upset. Now why. . . . [Unintelligible.]

Leonard: He told me caught hell from Carbo, caught hell from Norris. He caught hell from everybody.

Daly: Yeah, yeah, he got—got in a hell of a fucking—

Leonard: He's still in the jackpot, I guess, when he talked to me.

Daly: Sure, he's in a jackpot over it, a terrible jackpot. He says, 'What the hell, Bill,' he says, 'I honestly thought that, well, if he wins the fight, he has to lick him again,' and he says, 'then we could work it out between us.' He says, 'I never thought the guy would fucking jump the fence and carry on this way. . . . [Unintelligible] *trying to destroy me,*' he says, *'fuck them, I'll have them destroyed.'* He's fucking mad, Truman is. Why does this Nesseth want to fight with everybody for?" [*id.* at pp. 10-11. Emphasis supplied.]

Then Daly explained Carbo's and Palermo's *modus operandi* in maintaining continuing control of certain boxing champions:

"Daly: If I ever have two champions, I'd be having everybody around, you know, fucking parties and laughing and clowning. I wouldn't want to hurt nobody. This cock sucker steps out and wants to hurt everybody. Sure he did wrong if they

want to tell this fighter who to fight and everything. But they're taking that attitude for a reason. I know why they're taking it. Never told Lou Viscusi who to fight or what to do. [Viscusi was the manager of the lightweight champion, Joe Brown, whom Carbo and Palermo also controlled: See 15 R.T. 2258; 43 R.T. 6511-6512, 6520-6521; 37 R.T. 5458-5461, 5481; 16 R.T. 2328-2331.] *Carbo don't give a fuck as long as they're—they keep their income up. That's all. That's how they live. And that's how they are going to live as long as they can get away with it.*" [Exs. 100-102, 176, 101-A for Ident. at p. 11. Emphasis supplied.]

On cross-examination, Palermo was caught by surprise and answered the prosecutor with an echo of Daly's latter statement:

"Q. There was nothing wrong with what you were doing, was there? A. *I don't believe so. We have been doing this for years. This is the first time this kind of case ever came about.*" [40 R.T. 5985. Emphasis supplied.]

The conversation shifted to Carbo's threatening calls and the visits to Leonard by Sica and Dragna. Daly predicted what Sica and Dragna would say if the police were ever brought into the case:

"Daly: The first thing they're going to say to the cops, 'Somebody owes my friend, my friend's money, and I only asked them to pay it. I haven't laid—we haven't laid our hands on him.'

Leonard: One day they are real nice, oh, Jesus

Christ, they're so nice and mushy, mushy—and the next day. . . . [Unintelligible.]

Daly: I've been in on so much of this—fucking escape this thing very nicely—but this guy Don is walking on air. His fucking fighter will fuck him in the long run." [Exs. 100-102, 176, 101-A for Ident. at p. 13. Daly's last remark was clairvoyant: see Don Jordan's testimony when called as a witness for the defense: 23 R.T. 3415, 3419-3420; 26 R.T. 3743, 3773-3774, 3777-3781; 3793-3808; 42 R.T. 6291-6292, 6298-6303; Ex. 129.]

Daly explained that if Nesseth would not capitulate, Carbo and Palermo would lose control of the welter-weight title:

"Leonard: Where does Flaherty come in? Say he wanted to meet Jordan, would he be all right with Carbo and these guys, or would he be on the outs?

Daly: Uh, in this here fight?

Leonard: Yeah, say Moyer won, I mean, does he work for those guys?

Daly: Oh, not now, no, because he has no control over you people.

Leonard: No, I'm talking about Flaherty.

Daly: If Flaherty wins—

Leonard: Say Flaherty wins with Moyer, does he work with—

Daly: With them? Not now he won't work with them, because he's getting a free ride. Nesseth is giving him a free ride.

Leonard:. . . . [Unintelligible.]

Daly: If he was getting a crack at the title, *though The Combination*, they would retain their

piece for Moyer. Sure Flaherty will give up. Sure.

Leonard: He always swears he didn't give up and all that shit.

Daly: Yeah, he gives up to Norris and to Truman.

Leonard: He set up there one day and said, 'I don't give up to no son of a bitch. I'm independent.' He says, 'I wouldn't give a guy ten cents.'

Daly: Well, shit, Kearns and I had a piece to show in fucking, in—what you call it. I collected the money.

\* \* \* \* \*

Daly: It's all—one hand washes the other. It don't mean nothing, though. Independent of what? Fucking business—real estate guy. If you and I had a real estate business and there's a piece of property over there for sale, and you got it under control, and I say, 'Well, I got a buyer,' you say, 'We cut the commission.' They do it in the banks. They do it in real estate. They do it all over. Independent. What's—sure Flaherty's independent. They wouldn't tell Flaherty who Moyer's going to fight.

Leonard: . . . [Unintelligible.]

Daly: *As long as the loot kept coming in. That's their fucking pitch is the loot.* The fucker, anybody can tell anybody to fight . . . [Unintelligible], Jesus Christ, they couldn't tell Weill who to have Marciano to fight, or—

Leonard: There's one thing about him, too. I guess he was in good with him for years and years.

Daly. Who? Weill?

Leonard: Uh huh. (Indicating yes.)

Daly: *Fucking pays off like a fucking slot machine.* Look at the son of a bitch is a millioniare himself. For Christ's sake.

Leonard: Yeah, fight champions, or something.

Daly: I don't know, every fucking fighter they got, they love to give Weill a fucking title holder. You know, if you get—if *he has a fighter, he gets a crack at the title right away.*

Leonard: He's very close with—to The Gray then, because they were making money with him.

Daly: He's close now with The Gray. He's very close with Gray, Weill is—very close—inseparable, they are.

Leonard: . . . [Unintelligible.]

Daly: Frankie don't like him as a person. Dislikes him as a person because he's a greasy, fucking pig. But—

Leonard: He cut up millions with him.

Daly: Business transaction, that's all. Frankie don't want him around even socially with him, because he's a fucking—now Weill and Viscusi, you know, them guys are the old standbys, standing by. For Christ's sakes, if I had a fighter, if I had a champion, I'd certainly make a deal with him." [Exs. 100-102, 176, 101-A for Ident. at pp. 14-16. See Section B, above, for discussion of Carbo "holding trial" for Leonard for not matching more of Weill's fighters and for reference to Carbo's and Palermo's telephonic demand of \$2000 from Viscusi.]



Daly remarked that he could not understand what Carbo's and Palermo's plan was in making calls to Leonard but not attempting to contact Nesseth directly. He inquired of Leonard whether Nesseth had ever met Carbo. Leonard indicated that he did not think so. [Exs. 100-102, 176, 101-A for Ident. at pp. 18-20.] Then Daly inquired of Leonard whether Nesseth was acquainted with any members of the underworld community in Los Angeles:

"Daly: Does he know these fellows around here? Does he know—

Leonard: He knows who they are. He doesn't know them, personal.

Daly: He don't know Mickey or anybody?

Leonard: No, uh uh. No, the other day is the first time he ever met Joe Sica. And when Blinky walked in first with Dragna, he just walked out, Don did. And Blinky didn't try to stop him or talk to him or anything. Then the next day when he came in with Sica, well, he said, 'I'm going to sit down and talk with you.' So he sat down for about—about an hour, I guess, but Blinky was screaming and hollering and—'It's not the money. We want to know what you're going to do with the fighter. We want the money, but,' he says, 'We want to know who he's going to fight and where he's going to fight or who he's going to fight.'

Daly: They want one match to get rid of you.

Leonard: Yeah, they insisted on Hart.

Daly: They want to get rid of it, yeah.

Leonard: He kept—

Daly: I don't know whether Jordan can lick Hart.

Leonard: He kept saying that Carbo's going to be madder than a son of a bitch, and that he was mad already, but he's going to be madder yet.

Daly: Blinky handled this. He's dying himself, Blinky is, for fucking it up. And what makes them look bad with Glickman is—here's Glickman, they say 'You don't—let us handle this here deal.' Jesus Christ, and Glickman is, I guess, calling up Frankie, 'Say, huh? You've made a pretty good fucking deal.'” [Exs. 100-102, 176, 101-A for Ident. at pp. 20-21. Compare the testimony of Akins' manager, Bernard Glickman, when called as a witness by the defense: 29 R.T. 4246-4250; 4258-4271, 4273-4288; 43 R.T. 6487-6492.]

Daly made it clear that Nesseth and Leonard were challenging an established institution: Carbo's permanent control of the lightweight and welterweight championships:

“Daly: One thing, if you get the fucking title on your own, they don't interfere with you. You know, if you get through. *If you bust through the barrier. If you get through, they don't interfere with you.* They're pretty much on the level that way.

Leonard: There ain't no chance getting the lightweight or welterweight title, though, unless you do own him.

Daly: No.

Leonard: I don't know; how many years have they had it? He told me—he said, 'This is the first time in 25 years I got screwed like this.' Well, you go right back: Saxton, Bratton, Gavilan, you can go from there on.

Daly: That's right. You could go back. How many years he say, 25?

Leonard: Yeah." [Exs. 100-102, 176, 101-A for Ident. at pp. 22-23. Emphasis supplied.]

Daly mentioned a telephone call from Carbo after one o'clock in the morning on May 11, 1959; Carbo was furious about Leonard and Nesseth. That same day Daly met Gibson and flew to Los Angeles with him. Gibson was upset, saying he was in a "jackpot" because he allowed the title to get out of "their" hands. Daly concluded: "He doesn't want to grab another Nesseth as long as he lives." [*id.* at pp. 23-24.]

Daly spelled out the operations of the conspiracy between the I.B.C. management and the Carbo group:

"Daly: Oh, Truman's all fucked up, too.

Leonard: Well, he told me—you know he met Frankie. He told me that, 'Jesus Christ, the man down there is giving me holy hell. You know I'm in a hell of a jam, and on top of that, Norris is mad.'

Daly: This is the first time that proves to Norris that Truman was wrong. He had a . . . [Unintelligible] this time. He okayed the fight. He didn't get the full okay out here, but he okayed you anyhow. But that's neither here nor there. But Don was in the conspiracy to fuck them, you know." [*id.* at p. 30. Compare Palermo's statement, above, on May 6, when he acknowledged that Gibson had said that he had "handled everything" in Los Angeles.]

Then, the discussion shifted to the current pressure tactics in Los Angeles in which Palermo and Sica were

involved. Daly used this as a springboard for an extended, detailed explanation of the attempted murder of another boxing figure who had challenged the Carbo monopoly, Ray Arcel. Leonard related a threat that had been relayed to him from Sica. [See 43 R.T. 6355-6357.] Leonard inquired as to the reason why Sica was getting involved in something which was not his business. [Exs. 100-102, 176, 101-A for Ident. at pp. 31-32.] Daly supplied the answer:

“Daly: Well, then, people in New York do them favors.

Leonard: Yeah. Then I guess Blinky’s connected with what? The Longshore outfit?

Daly: Yeah . . . [Unintelligible] that’s one of his outfits. *They’re up to something with Nesseth. They’ll get—throw some fucking—*

Leonard: Bomb?

Daly: *Bomb his porch off or something.*

Leonard: You know they didn’t like about Arcel. You know Arcel thought he was pretty smart, too.

Daly: Lucky thing Arcel didn’t die.

Leonard: Yeah. They never did get him either, did they?

Daly: No. . . . [Unintelligible.]

Leonard: Did Arcel really see him or not? He probably didn’t even know what hit him?

Daly: It’s like you and I talking and somebody walking over.

Leonard: Oh, Jesus Christ. When Carbo called me—

Daly: *See what they do. They use a water pipe, see. You know, regular lead water pipe. Lead*

*pipe. And about that short. About that thick. And they just get an ordinary piece of newspaper, see, newspaper don't show fingerprints. Then they take it and they wrap it just in the newspaper, see—*

Leonard: . . . [Unintelligible.]

Daly: *Just an ordinary piece of paper, that's all they ever use. And you sitting in a crowd. And they try to give you two bats, and they kill you with two if they can. But they whack you twice and split your—fracture your skull, and knock you unconscious, and they just drop it. And if they drop it, they can't—and if they drop it, they can't—there's no heat. You can't—you haven't got no weapon on you. If they said you did it, what the hell, you drop it in a crowd or out in the street. They drop it immediately. After they do it they drop it. And after they drop it—the law—they're protected by the law. They have to have witnesses. They seen them come out and that's the guy, and that's what he used.*

Leonard: You know, that's what Frankie told me. He said, 'We got friends out there.' He says, 'I don't need to even leave here.' I don't know where he was at. I don't even know where he was calling from. He didn't tell me. He called direct. No person-to-person. You pick up the phone, and here he is.

Daly: . . . [Unintelligible.] That Ray was lucky he lived. The poor son of a bitch.

Leonard: He's a nice guy, you know, really.

Daly: He—he—he just got fucking stupid. He had no fucking right doing this and Ray—



Leonard: Well, he was with Carbo for years.

Daly: That's right, Jackie. He was with him for years, and Frankie gave him Teddy Yarosz, gave him this fighter and that fighter, and he always worked with him and—

Leonard: What did he do? Just didn't want to give his piece of the show, wanted to keep it all, huh?

Daly: Well, he reasoned it out with me. He said, 'Look,' he says, 'Angel Lopez knew the sponsor who I got the deal from and he wanted to be in.' And then he says, 'I figured that if I don't bother with Frankie, maybe Lopez would straighten out Frankie later.' *Son of a bitch had to be hurt. He had no right going to—if you were my partner, and somebody else comes over my head and deals with you, you know, or deals with me, it's no good. And we get all loused up. No, he didn't see who hit him. Willie Ketchum standing talking to him. [Compare Daly's solicitous feelings expressed for Ray Arcel on cross-examination during the trial: 23 R.T. 3387-3388.]*

Leonard: Willie might have seen who he was.

Daly: He went in the hotel. *No, they were both in the cellar. They wouldn't know. They used a couple kids from Boston to do it.*

Leonard: They always use professionals, guys from out of town.

Daly: Yeah, they were kids.

Leonard: Like here, if they wanted Don and I, they're not going to use somebody that we'd know around here.

Daly: *No. The Sicas would be home.*

Leonard: That's right.

Daly: *In a public place, watching Don Rickles' show.*

Leonard: And the first thing you know—boom, I'll be laying out there, and don't know what the hell hit me.

Daly: Now, I don't—I don't think—see, here's what they do. They—

Leonard: They try to reason as far as they can. Every angle they can use.

Daly: Yeah. They're going to—but they're going to—I don't know what way they're going to handle that Nesseth, but they're going to handle him some fucking way. . . . [Unintelligible.] Come to think of it, has he got a used car lot yet?

Leonard: Yeah, he works with his brother. They still got it. His brother's running it.

Daly: *You know where the joint is?*

Leonard: Oh, yeah. Yeah. It's advertised on TV.

Daly: They'll use some way that'll—" [Exs. 100-102, 176, 101-A for Ident. at pp. 32-35. Emphasis supplied.]

Daly brought up the question of why Gibson wanted him to remain in Los Angeles:

"Daly: But I'd like to get out of this fucking place here now. I got a lot of things home to try to straighten out. But Truman says, 'Wait 'til Monday.' He's coming in Monday. What'll happen Monday, Jack? I can't get heads or tails out—

Leonard: I can't see what the hell he's going to do. Unless he gets out here and talks, but—

Daly: What is it? What are we going to—

Leonard: I don't know what he wants to talk about. Because all he can talk to me about is the guy will fight Hart, and he's not going to fight Hart. He wouldn't fight Hart now, because they're all trying to force him, for a hundred and fifty thousand dollars. He asked me again the other day, 'Did you decide anything more on Hart?' I says, 'Jesus, Truman, I'm not even going to mention Hart because—' Markson mentioned Hart. Brenner mentioned Hart. Truman mentioned Hart. And these guys. It'll look like it's a deal where everybody's squeezing Hart. He's not going to fight—

Daly: He don't have to fight Hart. *You know why they're giving him the fucking squeeze.* You know, he don't know why. He thinks that they just want to steal his title and give it to Marty Stein. [Sugar Hart's manager: 31 R.T. 4642.] They don't give a fuck if it's Joe Stein or Phil Stein.

Leonard: As long as they get their money.

Daly: *As long as they get their fucking money.* So silly with his fucking ideas. [Exs. 100-102, 176, 101-A for Ident. at p. 44.]

Daly told Leonard that he had spoken to Carbo at the beginning of the week and was supposed to be contacted by Carbo again in a day or two. [*id.* at pp. 45-47. Compare Daly's testimony at trial to the effect that he had only spoken to Carbo on the telephone once in the 25 years he had known him. 23 R.T. 3366.]

Daly elaborated on the economic pressure which the defendants would bring to bear upon Leonard by fright-

ening away an investor whose capital might save the Hollywood Boxing and Wrestling Club:

Daly: What does he want to do with the joint? What have you done? Have you got a deal out there?

Leonard: I don't think we got a deal. I'll know today. Chargin was supposed to come in last night. He didn't come. He's not coming 'til today.

Daly: And he's—

Leonard: And now Joe Sica wants to see him. [See Manual Dros' testimony: 15 R.T. 2204-2207.] He's liable to screw the—it all up. I don't know.

Daly: Does Sica know Don?

Leonard: No. He read it in the paper yesterday or something. And right away he wanted to get a hold of Chargin to—

Daly: Does he know Livingston?

Leonard: No.

Daly: *They'll find out who Livingston—*

Leonard: Oh, yeah, they've checked him already. They've sent some cars up north, trying to find out where they can locate him, and who he is. Try to put the—try to scare him away, you know.

Daly: *Oh, they'll get somebody up around San Francisco to go see him, and tell him to lay off you people. . . .* [Unintelligible] You know. So. it'll make the guy think a little bit, too, you know.

Leonard: 25, 30, 40 thousand—a guy is going to stop and think you know.

Daly: Yeah, and the guy's going to say, 'Look, we don't want your money to be hurt, but *we'll*

*fuck that club up every way we can.*' [See Chargin's testimony concerning the anonymous telephone threat three weeks later: 15 R.T. 2236-2240] All over a fucking nitwit like Don Nesseth. You can't talk to Nesseth? He won't listen?

Leonard: No, I talk to him, Bill. Hell, there's nothing to do. He doesn't want any parts of those guys you know.

Daly: He don't want to even discuss it, huh?

Leonard: No. He don't even want to talk about it.

Daly: What's his—just says he don't want nothing to do with it?

Leonard: No, he says he don't want anything to do with it, that he told Truman that and Truman says, 'Don't worry about it,' he'd take care of it. And he says that he might have other fighters, and if he has other fighters, he's going to do the same thing with them, and that he don't want to do that. And he says he wants to—

Daly: *If he has other fighters, he won't get a fucking fight.*" [Exs. 100-102, 176, 101-A for Ident. at pp. 49-50. Emphasis supplied.]

Then, Daly explained that Nesseth's hope that he could have his fighters appear through the matchmaker at New York's St. Nicholas Arena, Teddy Brenner, was futile because Brenner was controlled by Carbo. [*id.* at pp. 50-51, 21, 24-28.]

Daly returned again to the subject of persuading Nesseth to give in to the demands of the appellants:

"Daly: He won't work to get you off the spot? You tell him you're on a spot with these guys—



Leonard: Oh, he knows the spot we're on. . . .  
[Unintelligible.] He was there when Carbo called. He was in my office and—I don't know, I guess I turned white when he started screaming and threatening me: have people out here take care of me, and this and that. And I turned around and I told Don, you know, that my noose—my head was right in the noose, and he said, 'Well, Jesus, I don't know what we're going to do about it.' Like if you hear from Carbo today or tomorrow, what the hell, there's nothing to tell him. . . .  
[Unintelligible.]

Daly: He's liable to say, 'Are you friendly with that Nesselth?' And I'd have to say, 'I have to say hello to him. Outside of that I—'

Leonard: You never really talked to the guy. I mean, you know—

Daly: *This Nesselth knows I know the score, don't he?*

Leonard: Oh, yeah, he knows that.

Daly: *He knows I know what's going on, don't he?*

Leonard: Yeah, 'cause he asked me yesterday if you knew, and I said, 'Sure, he knows.' What the hell, we talked before. . . . [Unintelligible.] Talked couple times before here at the hotel, you know. He knows that you know.

Daly: See, what made Truman not look too bad is when Nesselth ran away from Truman.

Leonard: Yeah.

Daly: And you. You and Nesselth, and *they got you right in there. You can't get out of it.* They pulled away from Truman, then they said,

‘Well, Jesus, Truman ain’t so fucking bad, they’re fucking Truman, too. *He must have been trying to help us.*’” [*id.* pp. 52-53. Emphasis supplied.]

The meeting concluded with Daly indicating that he expected a call from Carbo and that Carbo would not wish to talk to Nesseth because Nesseth had “told his story already.” [*id.* at pp. 56-57.]

On May 15, 1959, Palermo met Gibson in Chicago and received two checks payable to him totalling \$9,000 which he immediately cashed. One check was drawn on the account of Title Promotions, Inc., a corporation entirely owned by Gibson. The other check was drawn upon the account of the Chicago Stadium Corporation at Gibson’s direction. Neither corporation had any legal obligation to pay Palermo for the purposes for which Gibson and Palermo testified he was paid. Gibson and Palermo testified that the \$4,000 check was reimbursement to Palermo for expenses incurred over a period of time by Palermo for his former boxer, Johnny Saxton, who had been declared an incompetent. However, Palermo treated this check as well as the \$5,000 check, as ordinary income when he filed his 1959 income tax return. [33 R.T. 4949-4955; 34 R.T. 4999-5001; 40 R.T. 6080-6083; 42 R.T. 6205-6209; 44 R.T. 6620-6625, 6629-6634; Exs. 133, 170, 171, 172, 173, 174.]

On May 20, 1959, the California State Athletic Commission precipitously held a public hearing in Los Angeles. This hearing was the first public exposure of the conspiracy. [6 R.T. 761; 12 R.T. 1680-1681; 32 R.T. 4673.] Leonard testified at this hearing in a state of great apprehension. He had requested the in-

terrogator, Jack Urch, not to make him to appear to be a 'stool pigeon' during this hastily arranged public hearing, since three of the defendants in this case would be present at the hearing: Gibson, Sica, and Dragna. Leonard feared that the defendants would kill him if he made a public disclosure at that time. [11 R.T. 1519-1520, 1523-1524.] Also, as Leonard pointed out on cross examination, if he made full disclosure of his involvement in this conspiracy, the exposure that he had had association with these defendants might have caused the Commission to revoke his matchmaker's license which was the basis on which he earned a living. [10 R.T. 1393-1403.]

As soon as Gibson returned to Chicago from the hearing, he received a telephone call from Carbo in which Carbo questioned him about what Leonard had testified about him during the hearing. Carbo evidenced surprise when Gibson informed him that Leonard testified that Palermo had entered his (Leonard's) office. Carbo replied that Gibson must be mistaken, that Palermo had not entered Leonard's office. [33 R.T. 4932-4935.]

Frank Marrone, a New York City Police Department detective assigned to the New York County District Attorney's Office squad, encountered Carbo in the course of his official duties in a private residence near Audubon, New Jersey at 12:45 a.m., May 30, 1959. Carbo was in the home of one William Ripka in the company of Palermo's brother-in-law Alfred Cori, brother of Clare Cori. [43 R.T. 6498-6500; 39 R.T. 5486-5487.] At this time, Cori was in possession of a facsimile of the \$1,000 money order sent by Palermo to Leonard in the name of "Daley." When Marrone and

five other persons entered the Ripka house that night, Marrone had been watching the house for two hours and forty-five minutes and Carbo and Cori had been alone in the house. [43 R.T. 6499, 6501-6509.] When questioned during this post midnight confrontation, Cori explained his presence at the Ripka house alone with Carbo on the grounds that he was there to do a job as a gardener. [43 R.T. 6510.] Palermo admitted Ripka was a "dear friend" of his and that he called this house frequently. [40 R.T. 6078-6079.]

On June 4, 1959, Don Chargin was planning another trip from San Francisco to Los Angeles the following day in connection with his negotiations with Leonard to take over the failing Hollywood Boxing and Wrestling Club. While at the Ringside Bar in Oakland, owned by Chargin's partner, Jimmy Dundee (a defense witness called by Sica), he received an anonymous telephone call:

Chargin: "—and the call stated to stay out of Hollywood and that they knew my flight number and, also, that 'You saw what happened to Jack Leonard,' and that was—then the party hung up."

Sica's defense witness, Tom Stanley, testified that Leonard had been beaten up. Leonard was visited by Stanley when he returned home from being hospitalized for his injuries in June. [20 R.T. 2882; 43 R.T. 6358.]

The next day, Chargin gave a statement to the F.B.I. in Los Angeles. [15 R.T. 2225-2227, 2236-2237, 2239-2240. See testimony of Manuel Dros concerning Sica's surreptitious inquiry concerning Chargin's arrival in early May, 1959: 15 R.T. 2204-2206, 2210. See,

also, Daly's prediction to Leonard on May 14, above, that "[T]hey'll get somebody up around San Francisco to go see him, and tell him to lay off you people. . . ."]

While Leonard was recuperating in bed from his injuries, Stanley visited him at home. [9 R.T. 1303.] Leonard related Stanley's remarks in his bedroom at this time as follows:

"He asked me how I felt, and everything, and then he told me he had told me something was going to happen to me and that I knew who I was dealing with and I should have known better than to do what I did, and I should line up with these fellows."

This was the only time Stanley had ever been to Leonard's house. [43 R.T. 6358-6359.]

On June 12, 1959, Leonard signed a statement for the F.B.I. which summarized much of the testimony which he gave during the trial. [6 R.T. 762.]

During the month of August, 1959, Leonard received a telephone call from Palermo. Palermo wanted to know if Leonard "still felt the same." Leonard replied in the affirmative. Then Palermo said:

"['W]ell, if you should change your mind, you can get all the money you want, if you just act right and be right with the right people.' "

Leonard informed Palermo that there was nothing that he could do, because he had already given his testimony. [6 R.T. 765.]



The following month, Leonard quit the boxing business. The Hollywood Boxing and Wrestling Club failed because Leonard could no longer obtain nationally known fighters:

“Leonard: I made calls all over the United States trying to get name fighters, but there was always the excuse they were busy, they would let me know later and things to that effect.” [6 R.T. 766-768.]

After spending 20 years in professional boxing as a boxer, manager, assistant matchmaker, matchmaker, and promoter, Leonard was forced to leave the Legion Stadium to become an automobile salesman. [5 R.T. 586.] The Club had been unable to pay Leonard his salary during August and September. In September the Club went into bankruptcy. [11 R.T. 1591-1593.]

On September 22, 1959, the ten count indictment in this case was returned by the Grand Jury for the Southern District of California at Los Angeles. [I C.T. 2-16.]

During the month of November, 1959, Leonard's fear of the defendants drove him to approach Palermo through his wife with respect to Palermo's offer in August, 1959, to pay him a substantial amount of money in exchange for his silence. While visiting her relatives in Pennsylvania, Leonard's wife talked to Palermo. A number of telephone conversations were had between Palermo and Mrs. Blakely which were not recorded. Thereafter, several telephone conversations between Palermo and Mrs. Blakely and between Paler-

mo and Leonard were recorded by Palermo. The proposition discussed was that Leonard and his wife would leave the country so that Leonard could not be forced to testify against the appellants, in exchange for which Leonard and his wife would be given \$25,000 so that they could afford to leave the country. [12 R.T. 1667; 8 R.T. 1032-1033; Ex. E.]

Leonard had received a number of telephone calls between the time of his public testimony before the California State Athletic Commission on May 20, 1959, and the time of his wife's departure for Pennsylvania in November, 1959, after the return of the instant indictment. These calls had intensified his fears. [12 R.T. 1663.] Threatening calls continued into the year 1961. When pressed by Palermo's counsel on cross-examination, Leonard testified that he thought that two of the threatening calls in the period immediately before the trial had been from Palermo, but he could not swear to it. [8 R.T. 1059.] Palermo's counsel also elicited from Leonard the fact that he was still in fear of Palermo's associates and had accepted protection from the police and the federal government when it had been offered to him and his family. [8 R.T. 1080-1085.]

VI.  
ARGUMENT.

A. The Indictment.

1. Where Underworld Reputation Is One of the Instruments of Coercion in an Extortion Conspiracy, This Fact May Be Pleaded and Proved as Any Other Material and Relevant Fact.

Appellants complain of pleadings and proof which establish the character and method of their extortion conspiracy, and they contend that where the underworld reputations of co-conspirators have been used as a weapon to induce fear in their intended victims, this fact cannot be proved as part of the prosecution's case-in-chief. [Sica's Op. Br. 42-52; Dragna's Op. Br. 31-34; Gibson's Op. Br. 42-44.]

It is appellee's position that the allegations set forth in Count One, paragraph 3c, and Count Five, paragraph 3c, of the indictment are material and relevant to the element of fear and the reasonableness thereof, both of which must be established beyond a reasonable doubt to prove extortion. Moreover, proof of these allegations relates to knowledge and criminal intent of the appellants as members of a criminal conspiracy.

"The gist of the unlawful act is extortion. Extortion involves a state of mind as an element of an offense under the Act. Unless there is some form of compulsion (either physical or fear) there is no crime under this Act."

*Nick v. United States*, 122 F. 2d 660 (8 Cir. 1941); *cert. den.*, 314 U. S. 687, *reh. den.*, 314 U. S. 715 (1941).

The allegations with respect to the participation of appellants Sica and Dragna in the extortion conspiracy, and the use of their reputations in furtherance of the conspiracy, were not contrived by the Government in order to put otherwise irrelevant and immaterial information before the jury. The indictment, in all particulars, was predicated upon relevant and material facts. Gibson himself admitted *after* the indictment was returned, during an appearance before the United States Senate, that he and his corporations, the International Boxing Clubs, used the "underworld" in the conduct of their business. [See Statement of Facts, above, and 34 R.T. 5050; 35 R.T. 5127, 5130-5136.] Moreover, while threatening Leonard's life, Carbo had twice asserted that he had connections on the West Coast who would take care of Leonard and Nesseth. In addition, there was the actual appearance of both Sica and Dragna within one week of Carbo's death threats, and their intense, uncalled for interest in obtaining Leonard's and Nesseth's submission to the extortive demands of the conspirators. Insofar as Leonard and Nesseth were concerned, the physical presence of Sica and Dragna had ominous overtones, since both were well known to them as notorious underworld figures, and Sica, in particular, was known to be an underworld enforcer.

In *Bianchi v. United States*, 219 F. 2d 182 (8 Cir. 1955), *cert. den.* 349 U. S. 915, *reh. den.* 349 U. S. 969 (1955), the Eighth Circuit discussed the "reasonableness" of the victims' fear (economic loss, injury to employees, damage to equipment) in the light of the evidence, and concluded that: "Under the record such a fear would not be an unreasonable one."

*Bianchi v. United States, supra*, at pp. 189-190. Significantly, the Eighth Circuit directed attention to the fact that bail was denied by the trial judge because "defendants had numerous arrests, some in connection with labor activities . . . many for investigation, peace disturbances, interference with lawful employment." Among them, as catalogued by the court, were arrests for suspicion of robbery, assault, carrying concealed weapons, suspicion of bombing and intimidation. It is pointed out in the opinion that "This evidence was, of course, not before the jury for consideration."

*Bianchi v. United States, supra*, at p. 190.

Nevertheless, it is apparent that the Eighth Circuit was anxious to demonstrate the outrageous backgrounds of the defendants in that case in order to give added meaning to their evidentiary discussion of the victims' state of mind. *Sub silentio*, the court appears to be saying that this information reinforced their holding that the "reasonableness" of the victims' fear had been sufficiently established and the Government's burden to prove this element of extortion amply sustained.

The suggestion that this must have been the court's intent is strengthened by their citation of *United States v. Compagna*, 146 F. 2d 524, 529 (2 Cir. 1944), *cert. den.* 324 U. S. 867, *reh. den.* 325 U. S. 892 (1945), which follows immediately after their discussion of the defendants' criminal record:

"The victims' fears originated from acquaintance with the general disorders and violence which had accompanied other strikes. As such, it was part of what everybody knows, and I cannot see



how it could have prejudiced the accused with the jury. Indeed it was entirely proper for the jury to infer that the accused expected to play upon precisely such fears. . . .”

The *Compagna* decision is worth comparing with the instant case, although the issues in *Compagna* are not so broad. The defendants in *Compagna* were charged only with *conspiracy* to extort. The indictment did not contain a substantive count of extortion. The case is further distinguishable upon the ground that the defendants did not use their own reputations to induce fear in the victims. In other words, personal reputation was not an integral part of the extortion plot as it was in the instant case. In affirming the conviction, Judge Learned Hand, speaking for a unanimous court (Judges Swan and Clark), prefaced the court’s opinion with a discussion of events, pre-dating the conspiracy charged, which shed light upon the conspiracy encompassed by the indictment.

During the case-in-chief, the Government called a number of motion picture producers and exhibitors who testified that they had been moved by fear of violence “because during other strikes there had been stoppages in the middle of performances; stink bombs . . . in theatres; members of the audience and recalcitrant exhibitors had been assaulted.”

*United States v. Compagna, supra*, at p. 528.

In the opinion of the majority of the court (Swan and Clark, JJ.), evidence as to the state of mind of the intended victims “was relevant to show that the scheme proved successful as part of the proof there had been a scheme at all . . . [and] that there is a

rational connection between the existence of the criminal agreement—‘the partnership in crime’—and the fact that the acts upon which the conspirators agreed, when carried out, had the expected effect upon those against whom they were directed. . . .”

*Id.* at p. 528.

Judge Hand, however, questioned the legal necessity of proving that particular victims had been placed in fear by the conduct of the defendants *since no substantive act of extortion was charged in the indictment*. Had extortion itself been charged “there would, we all think, have been no doubt of the relevancy of such testimony,” although it was not necessary to establish the existence of the conspiracy itself.<sup>7</sup>

Both the Second Circuit in *Compagna* and the Eighth Circuit in *Bianchi* [219 F. 2d at p. 192], have frankly acknowledged what must be paramount in every ex-

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<sup>7</sup>Judge Hand’s minority view was predicated upon a belief that relevancy was lacking in a pure conspiracy case since “the only evidence relevant to the existence of a conspiracy are facts which come, or at least might have come to the knowledge of the conspirators, among which the *undisclosed* mental states of mind of the victims . . . could not be.” [Emphasis supplied.] Of course, in the instant case, the state of mind of the victims Leonard and Nesselth was disclosed to the conspirators on at least three occasions during the period of the conspiracy. Consequently, Judge Hand seems to imply that when this occurs, the state of mind evidence is relevant *even when the substantive act is not charged*. In any event, Judge Hand did not believe that the state of mind testimony in *Compagna* constituted reversible error although it “*might have been if the testimony covertly convey[ed] to the jury an accusation of earlier and independent crimes.*” [Emphasis supplied.] Judge Hand conceded to his brethren, Judges Swan and Clark (this was adopted by the Eighth Circuit in *Bianchi, supra*) that, among other things, “*it was entirely proper for the jury to infer that the accused expected to play upon precisely such fears.* . . .” [Emphasis supplied.]

*Id.* at p. 529.

tortion case: that a jury should determine the *reasonableness* of the fear induced in the victims, and in doing so must consider whether or not particular defendants intended to capitalize upon and exploit the very fears which were entertained by their victims.

As shown in the Statement of Facts, above, and as will be demonstrated below, fear in the instant case was induced by the appellants through use of the underworld reputations of appellants Sica and Dragna. Carbo's threats involving connections on the West Coast had to be considered in context by the jury and thought given by them to the meaning of such terminology when communicated to Leonard and Nesseth. It is eminently proper to consider the jury's task in terms of "what everybody knows" and to assume that the jury concluded that the conspirators were preying "upon precisely just such fears," to wit, that Carbo had connections on the West Coast, meaning underworld associates, who would not hesitate to maim or kill if commanded to do so by Carbo.

*Cf. United States v. Bianchi, supra.*

"The proper test" to use in evaluating the character of the conduct in an extortion case, according to the Seventh Circuit, is to ask whether it is "threatening or harmless from the context in which . . . [it occurs] measured by the common experience of the society in which . . . [it is manifested]."

*United States v. Prochaska*, 222 F. 2d 1, 5-6 (7 Cir. 1955).

The court in *Prochaska* takes judicial notice "that the slang expressions employed [in that case] are part of the Hollywoodesque *underworld* and are essentially

synonymous with a promise of a 'one-way ride.' " [Emphasis supplied.]

*Prochaska* is one of a number of extortion cases, State and federal, which clearly hold that the determination of whether or not a threat has been uttered *and* whether or not the threat has placed the victim in fear—and reasonable fear at that—depends, in the final analysis, upon *all* the surrounding facts and circumstances and upon the context in which the language is uttered. Implicit in this proposition is the corollary that the prosecution must be entitled to put the conduct of the defendants in context so that a jury can sensibly evaluate the reasonableness of the fear testified to by the victims.

See, *e.g.*:

*People v. Dioguardi*, 8 N. Y. 2d 260, 168 N. E. 2d 683 (1960), *reh. den.* 8 N. Y. 2d 1100, 171 N. E. 2d 465 (1960);

*People v. Eichler*, 75 Hun. 26, 26 N. Y. Supp. 998 (1894);

*People v. Thompson*, 97 N. Y. 313 (1884);

*People v. Gillian*, 2 N. Y. Supp. 476 (1888);

*People v. Fox*, 157 Cal. App. 2d 426, 321 P. 2d 103 (1958);

As well as:

*Nick v. United States*, *supra*;

*Bianchi v. United States*, *supra*;

*Compagna v. United States*, *supra*;

and illustrative English cases which support the same principle, *e.g.*,

*Regina v. Warhurst*, 39 Cr. App. Rep. 100, C. C. A. (1955, Ct. of Criminal Appeal).

Application of these established principles will depend upon the facts of a particular case. For example, in *United States v. Varlack*, 225 F. 2d 665, 673 (2 Cir. 1955), the Second Circuit approved admission in evidence of a conversation between victims, out of the presence of any defendant or co-conspirator, as bearing upon the victims' state of mind. In *Nick v. United States*, *supra*, at pages 670-673, the Eighth Circuit held that admission into evidence of several conversations between victims, out of the presence of any defendant or co-conspirator, was proper, because they had a bearing upon the element of fear. This evidence even included a conversation in which a victim had compared his predicament with a previous occasion (not involved in the *Nick* case) on which he had been victimized by an extortionist. All of this was properly admitted because, "the gist of the unlawful act is extortion," and "extortion involves a state of mind as an element of the offense. . . ."

*Nick v. United States*, *supra*, at p. 671.

Consequently, the court held that the victim's previous experience in an extortion situation was relevant to his state of mind during the commission of acts perpetrated by the defendants and, when limited to that purpose,<sup>8</sup> it was properly before the jury. (It is interesting to note that in the *Nick* case "reputation" testimony from the victims, concerning persons connected with the defendants' labor union, was admitted into evidence, but the Eighth Circuit did not consider this issue on the merits.)

*Id.* at p. 670.

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<sup>8</sup>Such a limitation was imposed by the district court in the instant case. See discussion below and 6 R.T. 722-724.



In evaluating the conduct of an extortionist, it “is not so much the cause of the victim’s fear, as it is whether or not defendants played upon that fear, in other words, made use of that fear. . . .”

*Callanan v. United States*, 223 F. 2d 171, 174 (8 Cir. 1955), *cert. den.*, 350 U.S. 862 (1955);

*People v. Dioguardi*, *supra*, 168 N. E. 2d at p. 689.

In *Dioguardi*, the New York Court of Appeals pointed out that:

“It is not essential that a defendant *create* the fear existing in the mind of his prospective victim so long as he succeeds in persuading him that he possesses the power to remove or continue its cause, and instills a new fear by threatening to misuse that power.”<sup>9</sup>

*Id.* at p. 689;

*Cf. United States v. Varlack*, 225 F. 2d 665, 668 (2 Cir. 1955).

In the instant case, the appellants Sica and Dragna joined the conspiracy to play upon pre-existing fears of Leonard and Neseth—fears which had already been communicated by Leonard on three occasions and by Neseth on one occasion, to a member of the conspiracy, Truman K. Gibson, Jr. Thus, when Sica and Dragna appeared upon the scene, the jury could and did properly “infer that the accused expected to play upon precisely

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<sup>9</sup>New York’s statutory definition of extortion is the model for the Hobbs Act. *United States v. Nedley*, 255 F. 2d 350, 355 (3 Cir. 1958).

such fears,” to wit, that these were Carbo’s underworld enforcers, his friends on the West Coast.

See:

*United States v. Compagna, supra*, at p. 529;  
*Bianchi v. United States, supra*, at p. 192.

The mere presence of Sica and Dragna constituted the illicit persuasion or threat much more dramatically than anything they could have said. The evidence established that their sole concern was to relieve the frustration of Gibson, Carbo and Palermo and to obtain for their confederates the object of their criminal demands. The record demonstrates, as Leonard and Nesseth testified, that Sica and Dragna had no lawful connection with the boxing business. Their appearance on the scene in May of 1959, could only have been calculated to create in the victims’ minds an impression that was expressed in the terms which Leonard and Nesseth used at trial, to wit, that they were confronted by *underworld figures*, and, in Sica’s case, *a strong-arm man*. This was why Leonard and Nesseth became terrorized. It explains their fear and Nesseth’s sudden decision to go to the police when he saw appellant Dragna enter Leonard’s office with Palermo at the Hollywood Legion Stadium. As the court in *People v. Dioguardi, supra*, pointed out, it is important to consider whether a defendant has “succeed[ed] in persuading him [the victim] that he possesses the power to remove or continue its cause, and instills a new fear by threatening to misuse that power”, in order to carry out the threats of his co-conspirators.

“No precise words are needed to convey a threat. It may be done by innuendo or suggestion . . . and the relationships of the parties may be considered . . .”

as well as all the circumstances.

*People v. Dioguardi, supra*, 168 N. E. 2d at p. 689.

*Michelson v. United States*, 335 U. S. 469 (1948), is heavily relied upon by appellants as authority for their contention that the testimony of Nesseth and Leonard concerning the underworld reputations of Sica and Dragna constituted reversible error. That there is no remote connection between the issues in *Michelson* and the issues in the instant case is demonstrated by pointing out that *Michelson* was charged with bribery of a Government official and the alleged error in that case occurred during cross-examination of the defendant's character witnesses respecting rumors of *Michelson's* prior arrest, approximately twenty-seven years before the trial of that case. The district judge, of course, limited the purpose for which the evidence was received and the Supreme Court, *per* Mr. Justice Jackson, affirmed. The Supreme Court restated a proposition of long standing, both acknowledged and respected by the Government in the instant case, that the prosecution may not prove a defendant's guilt *by showing his propensity or disposition to commit crimes*. The case at bar has nothing whatsoever to do with this well-recognized principle of law and no effort was made by the prosecution to prove the *bad character* of any appellant. The important application of *Michelson* to the instant case is its implicit holding that proof of reputation is proper when it is relevant to an element of the crime charged.

In the course of the *Michelson* opinion, the Supreme Court acknowledged that existing rules relating to proof of character and reputation are anomalous [*id.* at p. 476] and have many exceptions [*id.* at pp. 475-476, fn. 8.]

Moreover, the existing rule was not applicable in English common law and it is not now the rule in some civil law countries. [*id.*, p. 475, fn. 7.] *Corpus Juris Secundum* characterizes the rules regulating proof of character as “illogical, unscientific and anomalous.” [*Id.* at p. 475, fn. 5.]

Witkin asserts, in his discussion of the proof of prior bad acts of a defendant, that such proof, frequently admissible during the prosecution’s case-in-chief, is classified as an exception to the general rule of proof of character. He suggests that “the true rule could be more realistically stated in affirmative form: *That evidence of other crimes is admissible whenever it is relevant to a material issue, and that it should be excluded only where its sole purpose and effect is to show the defendant’s bad moral character (disposition to commit crime).*” [Emphasis supplied.]

Witkin, *California Evidence*, Sec. 136, pp. 158-159.

Witkin’s point strikes right at the heart of the whole character and reputation problem. In *Michelson*, the Supreme Court rejected a suggestion that it formulate a new rule in this area of the law. The Court noted the efforts of “those dedicated to law reform” who have dealt with the subject and cited in a footnote the American Law Institute’s Model Code of Evidence comment to Rule 304 which explains that:

“Character, wherever used in these rules, means disposition not reputation. It denotes what a person is, not what he is reputed to be. No rules are laid down as to proof of reputation, when reputation is a fact to be proved. *When reputation is a material matter, it is provable in the same manner as is any other disputed fact.*” [335 U. S. at p. 486, fn. 23. Emphasis supplied.]

A close reading of *Michelson* compels the conclusion that the opinion deals with impeachment of good character testimony and nothing else, and that *character* means “disposition”, whereas, the instant case is concerned, in a very limited and judicially restricted fashion, with *reputation* which, under the facts of this case, is “a material matter . . . provable in the same manner as is any other disputed fact.”

A.L.I., *Model Code of Evidence*, Comment to Rule 304;

Hale, *Some Comments on Character Evidence and Related Topics*, 22 So. Cal. L. Rev. 341, 344-345 (1949).

It does not advance the proper analysis of this problem to dwell, as appellants suggest we should, upon a particular principle of law which, on the facts before the Court, is immaterial to the issue. Long ago, Wigmore recognized, as appellate courts repeatedly acknowledge, that general principles considered in a vacuum do not decide specific cases. The “multiple admissibility doctrine” implicitly recognizes this truth:

“When an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not



inadmissible because it does not satisfy the rules applicable to it in some other capacity, and because the jury might improperly consider it in the latter capacity. This doctrine, although involving certain risks, is indispensable as a practical rule.”

1 Wigmore, *Evidence* (3rd Ed. 1940), Section 13, p. 300.

In *State v. Belisle*, 79 N. H. 444, 111 Atl. 316 (1920), the New Hampshire Supreme Court was confronted with an evidentiary situation similar to that in the instant case and the court implicitly followed the “multiple admissibility doctrine”. An assault victim was allowed to testify, over objection, that the defendant was a man (or kind of man) who he, the victim, thought would use force (thereby justifying the victim’s use of a gun: he was a special police officer). The defendant objected on the ground that this evidence tended to prove that he had a “disposition” or propensity to commit assaults and it was therefore inadmissible. The court disagreed:

“The defendant has argued the case here as though the evidence was ruled in and used as proof that Lyman assaulted Fox. It is undoubtedly true that at least a part of it was inadmissible for that purpose. The argument that the disposition, character, and reputation of Lyman are not evidence that he assaulted Fox is sound. The difficulty with the defendant’s case is that, while the evidence was not admissible for that purpose, it was clearly admissible to prove the reasonableness of the mode of defense from threatened attack adopted by Fox. *As the evidence was admissible*

*for some purpose, a general exception to it was unavailing.*" [Emphasis supplied.]

*Id.*, at p. 317, 111 Atl.

The district judge's deft handling of the evidentiary problem in the instant case manifests the application of "settled principles of . . . evidence to unprecedented facts."<sup>10</sup>

Although courts frequently talk in terms of weighing the prejudicial effect of evidence against its probative value, it is helpful to remember that most of the prosecution's evidence in any case is *prejudicial* and it is offered *against* the particular defendant or defendants. Judge Hand said in *Compagna*:

" . . . Next, the testimony as to what Kaufman said at a public meeting held after Bioff's doings began to be bruited, was susceptible of being understood as a threat against any present who should testify against him. It was competent under the plainest principles, and its admissibility did not depend upon its truth. *If it 'prejudiced' Kaufman, that was precisely its entirely laudable purpose.* . . ." [Emphasis supplied.]

*United States v. Compagna, supra*, at p. 530.

Whether or not the evidence should be excluded depends upon the issues framed in a particular case by the indictment and the plea of not guilty. Consideration of the evidence *without reference to the pleadings* makes

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<sup>10</sup>Language used by a California District Court of Appeal in discussing a novel fact situation and evidentiary problems arising therefrom. *People v. Scott*, 176 Cal. App. 2d 458, 492; 1 Cal. Rptr. 600 (1959), Pet. for Rehearing denied by Cal. Supreme Court.

it impossible to weigh the probative value thereof against its prejudicial effect.

The Supreme Court acknowledged in *Michelson* that the risks of “confusion of issues” and “unfair surprise” must be considered along with “undue prejudice” in determining admissibility of *character* evidence against the accused.

*Michelson v. United States, supra*, at p. 476.

It cannot be contended seriously by Sica and Dragna (and it is only to these appellants that this assignment of error should be considered) that they were subjected to either “confusion of issues” or “unfair surprise”. The indictment against them was returned on September 22, 1959. Thereafter they were aware of the charge contained in paragraphs 3c of Counts One and Five that:

“It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators’ demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesselth and obtain their agreement to the conspirators’ said demands.” [I C.T. 2, 9.]

The trial did not commence until seventeen months later and, by that time, Sica and Dragna were well insulated from either surprise or confusion, since long prior to trial, pursuant to Judge Tolin’s order, appellee made a formal written offer of proof concerning this matter. [II C.T. 308-309, 356-366.] More-

over, Judge Tolin's limiting instruction avoided any possible confusion of issues:

"Now, members of the jury, all of this little flurry comes about I think because lawyers are creatures of habit. We got pressed into formal molds and being aware of formal rules are inclined to be upset and think something is improper if it be within that strict classicism, but the situation here is one in which if you were dealing with literature or music you would say to let the classical period come into the romantic a little bit. It doesn't mean that you have total freedom but there is an old basic principle in American law respecting the trial of criminal cases, and that is that the reputation of a defendant is just not the thing in issue, you are trying a specific charge or a specific group of charges that are set forth in the indictment.

"Now, a person who is, generally speaking, a fine upstanding citizen might occasionally go out and commit an occasional crime, and a man who has a bad reputation might never commit one. He might not deserve the reputation, because reputation is something different from character. Character is the quality of person you are and reputation is what is believed in certain quarters regarding certain aspects of your life. It might be justified. It might not.

"So it would be very easy, unless the jury disciplines itself to consider the evidence for the purpose for which it is admitted, to get off on the track of whether or not a particular defendant has a reputation of a certain kind or other.

“Now, it is contended here by the Government that this witness Leonard was put in fear of Mr. Sica and I think they are entitled to show or have Mr. Leonard tell why he was afraid, and it is for you to judge if he was afraid and to look at the situation to see if it was one which was reasonably calculated to produce that fear. But the reputation of Mr. Sica per se is not before you, except in this limited way.” [6 R.T. 722-724. See also: 13 R.T. 1865, and the court’s instructions on the subject incorporated in its charge to the jury: 50 R.T. 7698-7699, 7706.]

The testimony of Leonard and Nesseth with respect to the reputations of Sica and Dragna was:

(1) Material and relevant *direct evidence* concerning the state of mind of the extortion victims. (Consequently, it was a fact to be proved in that it explained why confrontation by these *particular* persons induced fear. It not only explained fear but related to the reasonableness thereof.)

(2) Material and relevant circumstantial evidence respecting the knowledge and intent of all the appellants including Sica and Dragna. (Was it a part of the conspiracy to use the reputations of Sica and Dragna as a weapon to induce fear in the victims; were Sica and Dragna aware of this; and did they knowingly participate in the execution of such a scheme?)

“ . . . It was relevant to show that the scheme proved successful as part of the proof that there had been a scheme at all. . . . There is a rational connection between the existence of the criminal agreement . . . and the fact that the acts



upon which the conspirators agreed, when carried out, had the expected effect upon those against whom they were directed. . . .”

*United States v. Compagna, supra*, at p. 528.

(The view of Swan and Clark, JJ., concerning this evidentiary question.)

Surely, it cannot be seriously contended that the Government is proscribed, in a proper case, from proving that defendants used evil repute as a weapon in the commission of extortion, and that they succeeded in their objective by striking terror in the hearts of their victims. As counsel for appellant Sica argued to the district court in the course of his pre-trial motion to dismiss:

“In a very literal sense Joseph Sica, because of his alleged reputation and underworld connections, is alleged to be a deadly weapon.” [II C.T. 330.]

Judge Hand said in *Compagna*:

“. . . If a bully begins a negotiation by laying a firearm on the table, it is not relevant merely as to such negotiations with another person. But if later negotiations with the same person come in question and the issue includes the motives which actuated that person, it is highly relevant to show how the acquaintance began. That is too obvious to deserve elaboration.”

*United States v. Compagna, supra*, at p. 530.

In the instant case, Sica and Dragna served their co-conspirators like *firearms* on the negotiating table.

Although the reputation testimony was clearly relevant to two elements of the crimes charged, fear and

intent, the prosecution was allowed very little latitude in proving this aspect of the case. Even though Leonard and Nesseth were prepared to testify in detail concerning what they knew about Sica and Dragna prior to May of 1959, they were limited to a characterization of Sica as “an underworld figure and strong-arm man” and of Dragna as “an underworld figure.” For obvious reasons, the defense never questioned the accuracy of these conservative characterizations, either at the bench or in open court.<sup>11</sup> [See Exs. 135 for Ident., 137 for Ident. to 142 for Ident.]

The basic fact is that the conspirators selected two men whose names were well known in the Los Angeles community, particularly well known to persons in the victims’ strata of society. The fact that appellee was prepared to offer independent corroborating proof of the reputations of Sica and Dragna is reflected in colloquy at the bench out of the presence of the jury and in Government’s Exhibit 135 for Ident., and 137 for Ident. through 142 for Ident.

Based upon Sica’s record of violence and his criminal activities, the characterization of him as a “strong-arm man” is a conservative summary of more than ten years as a vicious underworld enforcer. [See Government’s Opposition to Sica’s Motion for Bail Pending Appeal filed in this Court on December 12, 1961.] It is difficult to see how appellee could have met its burden of

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<sup>11</sup>The activities of Sica as a Los Angeles underworld enforcer are revealed by official arrest reports marked for identification and they are summarized at pages 20-23 of Appellee’s Opposition to Motions of Appellants Carbo and Sica for Bail Pending Appeal filed in this Court on December 12, 1961; see also remarks of counsel for appellant Dragna concerning his client. [6 R.T. 710.]

proof in the instant case without going at least as far as it did. Appellee would have been left in a position suggested by trial counsel for appellant Dragna during colloquy at the bench when he said:

“I don’t know what the solution is, so far as the Government is concerned. I think it is just a situation where they have taken on something that they cannot prove under the laws of the United States in a court of law. It is just impossible to do it.”  
[6 R.T. 711.]

Counsel’s contention to Judge Tolin was answered by Charles Dickens when he wrote:

“‘If the law supposes ‘that’; said Mr. Bumble, . . . ‘the law is a ass, a idiot.’”

Dickens, *Oliver Twist*, Chapt. 51.

Much has been written upon the subject of admitting evidence which adversely reflects upon the character and reputation of an accused before he puts these matters in issue. In a recent well-reasoned opinion, the Supreme Court of California discussed a situation in which prejudicial testimony concerning “unspecified past misconduct” was admitted against a defendant charged with a sexual offense against a seven-year old girl. While acknowledging that evidence in this type of case is particularly inflammatory and that such evidence must be carefully scrutinized, still the court could find “no abuse of discretion in the determination that the probative value of [the] testimony . . . exceeded its prejudicial effect. [Citations omitted.] *That the jury might, from such testimony, infer facts which the People could not have proved directly, is a risk of*

*the sort which must be and is borne in the trial of many cases. . . .*" [Emphasis supplied.]

*People v. Burton*, 55 Cal. 2d 328, 347, 349-350, 359 P. 2d 433, 441, 443 (1961).

In the *Burton* case, the defense argued, and it is argued here, that testimony of this sort requires the defendant to either "sit silent" or "he can explain. . . . The minute he does that, that opens the door for all this other [evidence] to come in and [he] hang[s] himself."

*Id.* at 55 Cal. 2d 350, 359 P. 2d 443.

Yet, this argument led the court to reaffirm that "this is a risk of the sort which must be and is borne in the trial of many cases." [*Id.*] And, indeed it is, in *any* case where a defendant, confronted with incriminating facts and circumstances, declines to explain them away because of an inability to do so, particularly when, having taken the stand, he ignores such incriminating matters in his testimony.

*Caminetti v. United States*, 242 U. S. 470, 492-495 (1917).

Mr. Justice Frankfurter, in his concurring opinion in *Michelson v. United States*, *supra*, at pages 487-488, read the opinion of the Court as having left discretion with the district courts in the matter of excluding evidence.

"I do so [concur] because I believe it to be unprofitable, on balance, for appellate courts to formulate rigid rules for the exclusion of evidence in courts of law that outside them would not be regarded as clearly irrelevant in the determination

of issues. . . . To leave the District Courts of the United States the discretion given to them by this decision presupposes a standard of professional competence, good sense, fairness and courage on the part of the federal district judges. If the United States District Courts are not manned by judges of such qualities, appellate review, no matter how stringent, can do very little to make up for the lack of them.”

Of course, in the instant case the district judge exhibited the qualities referred to by Mr. Justice Frankfurter and, as has been noted above, the testimony allowed was not only the subject of an offer of proof and colloquy at the bench during trial, but was considered with deliberation through a pre-trial offer of proof submitted by appellee. [1 C.T. 356-366; 6 R.T. 705-717.]

Thereafter, very little was made of the reputation evidence by appellee, and in final argument, the subject was cautiously and, we submit, fairly dealt with by the prosecutor. [47 R.T. 6989-6991. See also the court’s charge to the jury, 50 R.T. 7695-7699, 7705-7708, reproduced in Appendix E, below.]

As the Supreme Court of California pointed out in *People v. Burton, supra*, 55 Cal. 2d at page 348: “The matter is largely one of discretion on the part of the trial judge.” The defendant should be protected from this type of evidence where it lacks relevance to any material issue other than propensity or disposition to commit crime. He “*is entitled to such protection against its misuse as can reasonably be given him without impairing the ability of the other party to prove his*



*case, or depriving him of the use of competent evidence reasonably necessary for that purpose.”* [Emphasis supplied.]

*Id.* at p. 349.

In the *Burton* case, the Supreme Court of California was impressed with the showing that the trial judge had indeed exercised discretion and had enforced certain ground rules upon receipt of the evidence:

“In the instant case, as shown by colloquies outside the presence of the jury, the trial judge and prosecuting attorney were aware of the . . . problems and heeded the . . . admonitions [of the Supreme Court of California]. . . .”

*Id.* at 55 Cal. 2d 349, 359 P. 2d 442.

In order to fully appreciate the essential nature of Leonard’s and Nesseth’s testimony on this subject, it is important to recall the chronology of events prior to the advent of Sica and Dragna upon the scene:

January 27, 1959: Carbo threatens Leonard’s life and warns that he, Carbo, has friends on the West Coast who can enforce his demands.

April 28, 1959: Carbo threatens to have Leonard and Nesseth killed and reminds Leonard that he has friends on the West Coast who will do this. Leonard is so frightened by this that he vomits.

*Within one week after this conversation of April 28th, the following occurs:*

April 30, 1959: Palermo arrives in Chicago and stays at the Bismarck Hotel (owned by Norris and Wirtz) at I.B.C. expense.

May 1, 1959: Palermo meets with Gibson in the lobby of the Bismarck Hotel and thereafter leaves the hotel for Los Angeles, neglecting to check out.

May 1, 1959: Palermo arrives in Los Angeles and registers at the Beverly Hilton Hotel under the alias of "George Tobias".

May 1, 1959: Palermo meets with appellant Dragna at Puccini's Restaurant in Beverly Hills.

May 2 or 3, 1959: Leonard is summoned to the Beverly Hilton Hotel by Palermo where he is taken to Palermo's room and, in the presence of Palermo, threatened by Sica.

May 4, 1959: Dragna and Palermo appear in Leonard's office at the Hollywood Legion Stadium. Nesseth walks out and goes to the police when he sees Dragna.

May 5, 1959: Sica and Palermo endeavor to get Leonard to meet them at Perino's Restaurant in Los Angeles.

May 6, 1959: Sica and Palermo appear in Leonard's office at the Hollywood Legion Stadium.

In the light of these events and the *selection of weapons* by appellants, not by the Government, it would not have been in the interest of justice to foreclose appellee from its proof.

Appellants Sica and Dragna were protected, however, by the extreme caution of the district judge who would not allow appellee, even on cross-examination of Sica and Dragna, to inquire about similar bad acts of these

appellants which should have been allowed under the authority of *Nick v. United States*, *supra*; *United States v. Varlack*, *supra*; *Bush v. United States*, 267 F. 2d 483 (9 Cir. 1959); and other cases.

“When an act is equivocal in its nature and may be criminal or honest according to the intent with which it was done, then other acts of the defendant, and his conduct on other occasions, may be shown in order to disclose the mastering purpose of the alleged criminal act.”

*Bush v. United States*, *supra*, at p. 489.

See also:

*Lawrence v. United States*, 162 F. 2d 156 (9 Cir. 1947);

*Tedesco v. United States*, 118 F. 2d 737 (9 Cir. 1941);

1 Wharton, *Crim. Evidence*, Section 237, pages 523-524 (12 Ed. 1955).

The trial court was confronted, and now this Court is faced, with the fundamental question of whether extortion committed in the manner of this case can escape prosecution. If so, then it follows that the worse the reputation of the enforcer, the less explicit his threats need be; and, if evidence of these facts is excluded, the extortionist with the most effective weapon (enforcers with reputations like Sica's and Dragna's) will escape punishment. It is this type of spurious reasoning which led the Supreme Court of Illinois to assert, with reference to the “prior bad acts rule” that “The party cannot

by multiplying his crimes diminish the volume of competent testimony against him.”

*People v. Cione*, 293 Ill. 321, 127 N. E. 646, 650 (1920).

In 1938, professor Julius Stone published an article in the Harvard Law Review which canvassed the American cases on the “other crimes rule”. He found that the law is often assumed to be otherwise than as stated in this rule, and that historically:

“American states then began with a rule of exclusion which was, like the English rule, a compromise between two extreme possibilities: on the one hand that other acts, because they cast light on propensities and thence on the issues, may always be fully explored; on the other hand that other acts must be absolutely excluded because of the prejudice, confusion, and surprise their use would create. The common law accepted neither extreme. It rejected the former; it only adopted the latter subject to the all-important reservation that if the other acts were relevant to guilt of the crime charged otherwise than merely through propensity, then those acts might like any other relevant facts be explored.”

Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988, 1033-1034 (1938).

See also:

Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv. L. Rev. 954 (1933).

Obviously, this is another way of stating the crucial question referred to in the footnote in *Michelson, supra*, which cites the American Law Institute's Model Code of Evidence: Is this evidence relevant to any issue other than propensity to commit crimes?

The analogy of the "other crimes rule" to appellee's position in the instant case is persuasive. It presents a situation in which the courts are willing to allow the prosecution to offer "prejudicial" evidence against the defendant during its case-in-chief, evidence probably more inflammatory with the lay jury than testimony reporting the defendant's crystallized image in society as a racketeer. Such reputation evidence is certainly admitted on as sound grounds, herein, as the "rumors" of a twenty-seven year old arrest permitted in *Michelson, supra*.

The fact that a jury is called upon to compartmentalize evidence is no reason to exclude it. They are asked to do many difficult things, up to and including excluding from their minds prejudicial evidence which has been stricken from the record. This is characteristic of the jury system.

In *United States v. Rosenberg*, 195 F. 2d 583 (2 Cir. 1952), *reh. den.* 195 F. 2d 609, *cert. den.* 344 U. S. 838, *reh. den.* 344 U. S. 889, *reh. den.* 347 U. S. 1021, *motion den.* 355 U. S. 860, the Second Circuit was confronted with a situation in which the word "Communist" was frequently bandied about during the course of the trial, and at least one of the witnesses, Elizabeth Bentley, was allowed to testify with respect to the nature of communism and the danger it represented to the United States. The Second Circuit, speaking through Judge Jerome Frank, held in this capital case:



“ . . . Whether and how much of that kind of evidence should come into a trial like this, is a matter for carefully exercised judicial discretion. We think the trial judge here did not abuse that discretion . . . the judge cautioned the jurors ‘not to determine the guilt or innocence of a defendant on whether or not he is a Communist.’ It may be that such warnings are no more than an empty ritual without any practical effect on the jurors. [Citation omitted] *If so, this danger is one of the risks run in a trial by jury; and the defendants made no effort to procure a trial by a judge alone, under Criminal Rule 23(a).*” [Emphasis supplied.]

*United States v. Rosenberg, supra*, at p. 596.

2. The Indictment Is Not Defective for Vagueness, Unintelligibility, nor Insufficient Allegations of Federal Jurisdiction.

Three appellants have made an assortment of assertions about alleged inadequacies of the indictment. Gibson contends that Counts One and Five are vague. [Gibson’s Op. Br. 26-28.] Dragna says that Count Five is unintelligible to him. [Dragna’s Op. Br. 33-34.] Gibson urges that Count One does not allege an effect upon interstate commerce. [Gibson’s Op. Br. 23-26.] Finally, Palermo has decided, after filing his Opening Brief, that it was time to contend, for the first time, that *all counts of the indictment* do not belong in a federal court, apparently because they have something to do with crimes involving boxing. Palermo’s shotgun blast at the indictment will be treated under this argument heading, for want of a better place to discuss it.

Since Palermo has not seen fit to comply with this Court's Rule 18(2)(c), it is difficult to determine the alleged errors of the district court of which he complains. [Palermo's Supp. Op. Br. 24-35.]

(a) *Counts One and Five Are Not Vague.*

Counts One and Five of the indictment each are conspiracies to commit certain offenses against the United States. Count One alleges that the objects of the conspiracy charged therein were the commission of offenses, to wit:

“ . . . Willfully to obstruct, delay and affect interstate commerce by means of extortion, in violation of United States Code Title 18, Section 1951.”  
[I C.T. 2.]

Count Five alleges that the objects of the conspiracy charged therein were the commission of offenses, to wit:

“ . . . Willfully and with intent to extort money and a thing of value, to wit, a share of the management of the prize fighter Don Jordan, from Leonard Blakely and Donald Paul Nesseth, to transmit in interstate commerce communications containing threats to injure the persons of Donald Paul Nesseth and Leonard Blakely in violation of Title 18, United States Code, Sections 371 and 875(b).” [I C.T. 9.]

Both Counts One and Five then proceed to allege, in considerable detail, the means by which the conspirators planned to accomplish the foregoing objects. [Count One: Paragraphs 3(a), 3(b), 3(c), and 3(d)—I C.T. 2-4; Count Five: Paragraphs 3(a), 3(b), 3(c), and

3(d)—I C.T. 9-10.] Count One concludes with the allegation of 21 overt acts in furtherance of the conspiracy. [I C.T. 4-5.] Count Five alleges 5 telephone conversations between Palermo and Carbo, and Leonard, as overt acts in furtherance of the conspiracy charged. [I C.T. 10-11.]

Both conspiracy counts charge the offenses in terms of the statutes alleged to be violated. They would be sufficient even if they failed to allege all of the elements of the substantive offenses which are the alleged objects of the conspiracies:

“ . . . It is well settled that in an indictment for conspiring to commit an offense—in which conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, . . . or to state such object with the detail which would be required in an indictment for committing the substantive offense. . . . In charging such a conspiracy ‘certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary.’ . . .”

*Wong Tai v. United States*, 273 U. S. 77, 81 (1927).

There can be no doubt as to the offenses which Counts One and Five allege the appellants conspired to violate. Gibson does not contend to the contrary. He complains that the allegations of the means by which the criminal objects were to be effectuated are unclear. We submit that paragraph 3 in each of the conspiracy counts clearly alleges the scheme for ac-

complishing the criminal objects of the conspiracies. The gist of Gibson's argument is that the indictment does not plead the evidentiary detail which would prove the offenses.

This Court has answered such a contention on many occasions:

"This indictment gives the gist of the offense of conspiracy, the agreement to commit an unlawful act and the means by which that agreement was to be achieved. . . . 'The particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of the conspiracy for which [appellants] contend is not essential to an indictment.' *Glasser v. United States*, 315 U. S. 60, 66. . . ."

*Schino v. United States*, 209 F. 2d 67, 69 (9 Cir. 1954), *cert. den.* 347 U. S. 937 (1954).

See also:

*Medrano v. United States*, 285 F. 2d 23, 26 (9 Cir. 1961), *cert. den.* 366 U. S. 968 (1961);

*Hopper v. United States*, 142 F. 2d 181, 184 (9 Cir. 1944) (En Banc);

*United States v. Polakoff*, 112 F. 2d 888, 890 (2 Cir. 1940), *cert. den.* 311 U. S. 653;

Rule 7(c), F. R. Crim. P.

In *Polakoff*, Judge Learned Hand held:

". . . The indictment merely alleged that the accused conspired 'to influence and impede the official actions of officers in and of the United States District Court \* \* \* in order that said Sidney Kafton would receive a sentence of not

more than one year and one day'. The challenge is that it should have specified who were the 'officers' that were to be so 'impeded'. We do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars. . . ."

*United States v. Polakoff, supra*, at p. 890.

Counts One and Five clearly allege the elements of the conspiracy, the elements of the offenses which are the objects thereof, and the role each of the five appellants was to play in their attainment.

(b) *Count Five Is Intelligible.*

Dragna advances an interesting theory, based upon neither reason nor authority, that a conspiracy indictment must allege overt acts which post-date the entry into the conspiracy of every member thereof; otherwise, he urges, the count is *unintelligible*. The general conspiracy statute does not specify when, with relation to the formation and termination of a conspiracy, an overt act in furtherance of the object of the conspiracy must occur. It simply requires that:

"[O]ne or more of such persons [the conspirators] do any act to effect the object of the conspiracy. . . ."

18 U. S. C. §371;

*Bannon v. United States*, 156 U. S. 464, 468-469 (1895).

The conspiracy may close the next instant or it may continue in existence for a century. Only one overt act need be pleaded and proved. Count Five alleges *five overt acts*. All five were proved at trial beyond a



reasonable doubt. Many other overt acts in furtherance of the criminal objects charged in Count Five were also established at the trial. They were not pleaded in the indictment because it was not necessary to do so under §371. One of those overt acts which were proved but not pleaded was a threatening call from Palermo to Leonard in August, 1959, more than three months after Dragna was shown to have been active in the conspiracy. This call was calculated to dissuade Leonard from testifying against the conspirators, and it occurred during the period of the conspiracy as alleged in Count Five. [6 R.T. 765.]

This call is not essential in order to answer Dragna's contention. However, it illustrates the illogic of his argument. The fact that Carbo made no threatening calls to Leonard after April 28, 1959, does not mean the conspiracy charged in Count Five terminated on that date. The role of Dragna and Sica which is charged in paragraph 3(c) of Count Five was to put force and content into Carbo's telephonic threats. Thus, their parts in the conspiracy were as necessary to the accomplishment of the scheme as the telephone calls which warned Leonard that Carbo had "friends on the West Coast". The evidence revealed threats in behalf of the conspirators long after the return of the indictment.

*Cf. McDonald v. United States*, 89 F. 2d 128, 133-134 (8 Cir. 1937).

Furthermore, even if paragraph 3(c) were surplusage in Count Five, this allegation is clearly essential in Count One. Since the proof in support of the identical paragraph in Count One was congruent with the proof

of the same allegation in Count Five, no prejudice could have resulted to Dragna from its presence in Count Five.

Finally, Dragna has not shown in his Opening Brief that he even preserved this argument by urging this ground below in support of a motion to strike paragraph 3(c) of Count Five.

(c) *Count One Alleges Facts Showing More Than the Minimal Effect Upon Interstate Commerce Which Suffices Under the Hobbs Act.*

Gibson's argument in support of his contention that Count One does not satisfy the interstate commerce element of the Hobbs Act seems to be an argument in support of a motion for reconsideration by the Supreme Court of its decision in *United States v. International Boxing Club*, 348 U. S. 236 (1955). It does not treat the test of the anti-racketeering statute which provides in pertinent part:

" . . . Whoever in any way or degree obstructs, delays, or affects commerce . . . by extortion or attempts or conspires so to do . . . shall [be guilty of a felony]." [Emphasis supplied.]

18 U. S. C. §1951.

In his brief, Gibson is really talking about the quantum of effect upon commerce necessary to invoke the Sherman Antitrust Act. 15 U. S. C. §1 *et seq.* The test is quite different for the offense charged in Count One:

"It seems apparent from the language of the statute that it was the intent of Congress to protect interstate commerce against extortion *which in*

*any way or in any degree reasonably could be regarded as affecting such commerce.* The exaction from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment and supplies, or who are engaged in constructing facilities to serve such commerce is, in our opinion, proscribed by the statute in suit.” [Emphasis supplied.]

*Hulahan v. United States*, 214 F. 2d 441, 445 (8 Cir. 1954).

See also:

*Anderson v. United States*, 262 F. 2d 764, 769-770 (8 Cir. 1959), *cert. den.* 361 U. S. 855 (1959);

*United States v. Varlack*, 225 F. 2d 665, 669-670 (2 Cir. 1955).

Judge Walsh, in the Southern District of New York, demonstrated the fallacy of Gibson’s argument:

“ . . . Defendants also rely upon certain holdings with respect to the Sherman Anti-Trust Act, 15 U. S. C. A. §§1-7, requiring that an indictment allege particulars showing a direct and substantial effect upon interstate commerce. *United States v. French Bauer, Inc.*, D. C. S. D. Ohio, 48 F. Supp. 260, appeal dismissed 318 U. S. 795 . . .; *United States v. Starlite Drive-In, Inc.*, 7 Cir. 204 F. 2d 419. These cases are not in point. Whereas under that Act it may be that a court must find that the acts complained of have a direct and substantial effect on interstate commerce, under the subject statute there is no need for such a finding. The statute provides that effect in ‘any way or de-

gree' is sufficient. Congress itself has concluded that any effect upon interstate commerce in any degree caused by extortion or conspiracy contemplating extortion is in itself substantial. . . . Congress quite understandably might prohibit extortion or conspiracies based on extortion which affect interstate commerce in any degree. Their corrosive quality is not likely to be subject to quantitative measurement to the same extent as the economic effect of combinations in restraint of trade."

*United States v. Malinsky*, 19 F. R. D. 426, 428 (S. D. N. Y. 1956).

The allegations contained in paragraphs 3(a) and 3(d) of Count One clearly satisfy the requirements of the cited cases. [I C.T. 3-4.] The scheme of the conspiracy, as pleaded in these paragraphs, included:

"[T]hreats of physical harm and violence and threats of economic loss and injury to the victims [Nesseth and Leonard, in order] to obtain monies representing a share of the purses earned by a professional prize fighter *then engaged in championship matches being nationally televised . . . and to obtain control of the professional activities of the same* [professional prize fighter] *by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.*

\* \* \* \* \*

" . . . It was an essential part of the conspiracy that defendant Truman Gibson, Jr., *who was an officer of the International Boxing Club,*

*Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade [the] victims . . . to accede to the demands of the conspirators for control of the prize fighter. . . .” [I C.T. 3-4. Emphasis supplied.]*

The italicized portions of these excerpts from Count One reveal a plan likely to have a substantial effect upon interstate commerce, if it succeeds. One of the foreseeable consequences of such a plan would be the sudden cancellation of a championship prize fight program scheduled for broadcast on television. This possibility alone is sufficient to invoke the Hobbs Act, forgetting the less dramatic effects that championship telecasts have upon interstate commerce, *e.g.*, interstate ticket sales, interstate contracts between boxers, interstate travel by the boxers, trainers, and managers, etc.

See:

*United States v. International Boxing Club, supra*, at pp. 245-248.

It is clear that the programming content of radio and television broadcasts are a matter of federal jurisdiction under the commerce power.

*National Broadcasting Co. v. United States*, 319 U. S. 190 (1943).

In fact, the content of television programs is a matter of *exclusive* federal jurisdiction under the commerce power.

*Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153 (3 Cir. 1950), *cert. den.* 340 U. S. 929 (1951).



Thus the allegations of Count One, which were abundantly established at trial (as well as additional impacts on interstate and foreign commerce. See section on instructions on the commerce element, below, for such evidence) satisfy the Hobbs Act requirement that the object of the conspiracy is calculated to affect commerce in some way or degree.

(d) *The Jurisdiction of the Federal Courts to Punish Violators of the Hobbs Act Does Not Depend Upon the Occupations of the Victims of the Extortion Plot.*

Palermo devotes twelve pages of his Supplementary Opening Brief to the fantastic proposition that it is not a federal crime to conspire to commit extortion which affects interstate commerce, to attempt to commit such extortion, to commit such extortion, to conspire to transmit threatening communications in interstate commerce for the purpose of committing extortion, and to transmit such threatening communications—if the victims of each of these crimes are employed in some capacities in the professional prize fighting business. He invokes the Fifth and Tenth Amendments to the Constitution as his authority.

His arguments numbered II and III [Palermo's Supp. Op. Br. 24-32] are answered by the *Nick* case:

“ . . . That the Act is within the commerce clause seems clear under *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 604-606. . . . The *Fainblatt* case holds that manufacturers of articles entering into interstate commerce are within the commerce clause and subject to the National Labor Relations Act, 29 U. S. C. A.

§151 et seq. 'where the cessation of manufacture necessarily results in the cessation of the movement of the manufactured product in interstate commerce.' 306 U. S. page 604. . . . In that case the 'cessation of the movement of the manufactured product in interstate commerce' existed because if the clothing could not be manufactured it could not enter into interstate commerce. . . ."

*Nick v. United States*, 122 F. 2d 660, 668-669 (8 Cir. 1941), *cert. den.* 314 U. S. 687, *reh. den.* 314 U. S. 715, *reh. den.* 316 U. S. 710.

See also:

*United States v. Varlack*, 225 F. 2d 665, 672 (2 Cir. 1955);

*Hulahan v. United States*, 214 F. 2d 441, 445 (8 Cir. 1954).

Palermo suggests a truly novel conception in his argument number IV [Palermo's Supp. Op. Br. 32-33.] If his interpretation of the law were followed by the courts, they would be violating the concept of equal protection of the law implicit in the very Fifth Amendment due process of law clause upon which he relies. A distinction cannot be drawn between protecting victims of interstate telephonic threats who work in one industry and those who work in another. Yet this is his suggestion. A legislature may not make such an invidious distinction between classes which will be protected by the law and classes which shall be unprotected.

*Cf. Morcy v. Doud*, 354 U. S. 457 (1957).

The effect of adopting Palermo's contention would be to invite racketeers to concentrate their "shake-down"

activities on the professional prize fight business and every other business “which is not commerce”. This would give racketeers a license to steal, since extortion threats could be transmitted with impunity from one State to another State to victims in these industries against which Palermo says the Constitution discriminates. This is nonsense. Palermo has confused *commerce* in its economic meaning with commerce as a term of art for interstate and foreign communication and transportation, which is its usage in §875(b).

Palermo’s argument numbered V [Palermo’s Supp. Op. Br. 33-35] appears to confuse Counts One and Five. Both charge conspiracies, but the objects of each are different, and the statutes under which they are brought are different. His contention that the conspiracy and substantive offenses proscribed by 18 U. S. C. §1951 merge is simply not the law.

*Callanan v. United States*, 364 U. S. 587 (1961).

In conclusion, all errors raised by Palermo under his arguments numbered II, III, IV, and V, should not be considered by this Court *de novo*, because they were never raised in the district court.

**3. Motions to Dismiss the Indictment for Alleged Failure to Make Requisite Allegations of Venue Were Properly Denied.**

Gibson asserts that the second conspiracy count in which he is charged, Count Five, does not allege venue to be in the Southern District of California with sufficient precision. [Gibson’s Op. Br. 29-32.] Carbo contends that Counts 7 and 9 should have been dismissed for lack of a venue allegation. [Carbo’s Op. Br. 66-68.]

(a) *No Statutory or Constitutional Venue  
Rights Were Infringed.*

Appellants were guaranteed by the Constitution that they could be tried in “the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .”

Constitution, Sixth Amendment;

Constitution, Art. III, Sec. 2, Cl. 3.

This right was vindicated: the crimes charged in each of the ten counts in the indictment were proved to have occurred, in whole or in part, in the Central Division of the Southern District of California. Appellants do not contend otherwise.

18 U. S. C. §3237.

Nor were appellants kept in the dark as to appellee’s intention to offer evidence at the trial which would establish that the indictment was returned in a jurisdiction having the proper venue. In order to avoid any such misapprehension, a bill of particulars was filed on October 28, 1959, detailing the locations of all of the meetings and the termini of all the telephone calls which were the subject of the overt acts alleged in the two conspiracy counts (One and Five) and the five substantive counts charging threatening communications transmitted in interstate commerce (Six through Ten). [I C.T. 177-179.]

Counsel for Carbo suggests that the bill “was in error because it indicated that the calls were initiated in Los Angeles, and so it effectively prevented appellant from exercising his rights under §3239 [of Title 18, U. S. C.].” [Carbo’s Op. Br. 68.] This allegation is

erroneous in both fact and law. A reading of the bill of particulars will reveal that Carbo was informed thereby not where the transmission of threats was initiated and where the transmission terminated; but rather, he was notified that the evidence would show that the two geographical termini of the telephone calls were Los Angeles, California, and Philadelphia, Pennsylvania. [1 C.T. 179.]

It is immaterial how his counsel interpreted the bill on this point, however, since the Central Division of the Southern District of California was the proper venue for all ten counts of the indictment. If he had moved the court to transfer venue to the Eastern District of Pennsylvania pursuant to 18 U. S. C. §3239, his motion would have had to be denied. Carbo could invoke §3239 only with respect to Counts Seven and Nine if they were the only counts in the indictment, since these are the only counts charging him with violation of 18 U. S. C. §875(b). However, Counts One, Three, and Five charge Carbo under statutes which would invoke §3237 rather than §3239. The presence of Count Three in the indictment would have required the denial of a motion by Carbo to transfer venue to Philadelphia since it does not allege facts which are cognizable in that district. An indictment may not be broken into pieces in determining a motion for a change of venue.

*United States v. Hughes Tool Co.*, 78 F. Supp. 409, 410 (D. Hawaii 1948).

Of course Gibson could not have invoked §3239 either, since he was not “indicted under [section] 875” despite the sophistic suggestions in his brief to the contrary. [Gibson’s Op. Br. 29-30.] He fails to dis-



tinguish between a substantive offense, *e.g.*, transmitting a threatening communication in interstate commerce with the intent to commit extortion (for which he was *not* charged), with a conspiracy to commit that substantive offense (for which he *was* charged).

*United States v. Rabinowich*, 238 U. S. 78, 85-86 (1915).

Gibson's suggestion that the overt acts alleged in Count Five are defective, for failure to allege that Gibson committed one of them or that the telephone calls referred to in these overt acts were interstate communications, is baseless. [Gibson's Op. Br. 30.] It is obvious that 18 U. S. C. §371 does not require that the Government either plead or prove an overt act by *each* conspirator in order to convict him thereunder. One will suffice by the terms of the statute. It is equally obvious that the conspiracy charged in Count Five could have been pleaded and proved without a single overt act involving a telephone conversation. The indictment might have alleged that the overt acts were Gibson's meeting with Leonard, Nesselth, and McCoy at the Ambassador Hotel in Los Angeles on October 23, 1958, and Palermo's transmittal of the \$1,000 Western Union money order to Leonard in Los Angeles on December 23, 1958. [Exs. 59, 82.] If the overt acts in furtherance of a conspiracy to transmit threatening communications in interstate commerce need not be threatening communications, *a fortiori*, overt acts which are telephonic communications need not be alleged to be *interstate* communications.

Gibson also complains that he cannot discern from Count Five which of the overt acts occurred in Los

Angeles County and which occurred “in other places.” The obvious answer, of course, is that *each* overt act alleged in Count Five occurred “in Los Angeles County” and “in other places”, since each call was in fact an interstate call with one terminus in Los Angeles. The bill of particulars settled this matter conclusively. [I C.T. 178-179.]

(b) *Venue Is Not One of “The Essential Facts Constituting the Offense Charged” Which Must Be Alleged in the Indictment.*

Carbo contends that Counts Seven and Nine of the indictment should have been dismissed because they do not contain an allegation determining the venue of the trial. He cites one case whose *alternative holding* is that an indictment which failed to allege the district in which the crime was committed, when not followed by a bill of particulars supplying this information, was *demurrable*.

*Bratton v. United States*, 73 F. 2d 795 (10 Cir. 1934).

The *Bratton* case is not authority for this case for several reasons. The most important is that it antedates the promulgation of the Federal Rules of Criminal Procedure by twelve years. Another reason for doubting the authority of *Bratton* is that there is a strong and sufficient basis for the reversal to be found there in the other inadequacies of the indictment before that court, which is the first reason stated by the court for the reversal. Finally, there was a possibility of surprise to the defendant presented by the facts of *Bratton* which did not exist here. No bill of particu-

lars was ever given by the prosecution in *Bratton*; thus, the defendant was liable to surprise at trial when evidence of the locus of the crime was offered. Not so here, since the venue of the crimes charged in Counts Six and Nine was included in a bill of particulars filed about sixteen months before the trial began.

The Federal Rules of Criminal Procedure were promulgated to abolish the complexity of common law procedure which included the demurrer to the indictment referred to in *Bratton*:

“These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure *simplicity in procedure*, fairness in administration and the elimination of unjustifiable expense and delay.” [Emphasis supplied.]

Rule 2, F. R. Crim. P.

While formal defects in an indictment might jeopardize it when challenged by a demurrer, at common law, indictments are no longer to be scrutinized with the eye of a nineteenth century pleader in order to pass the test of sufficiency. The test of a sufficient criminal charge is set forth in the Rules as follows:

“The indictment or the information shall be a plain, concise and definite written statement of the *essential facts constituting the offense charged*. . . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. . . .” [Emphasis supplied.]

Rule 7(c), F. R. Crim. P.

The same rule provides for the filing of a bill of particulars when cause is shown therefor to the court.

Rule 7(f), F. R. Crim. P.

Demurrers and motions to quash were abolished by the promulgation of the Rules.

Rule 12(a), F. R. Crim. P.

The effect of the creation of the foregoing rules was to invalidate decisional law, *e.g.*, the *Bratton* case, *supra*. The identical question raised by Carbo with respect to Counts Six and Nine was decided in 1958 in the Eastern District of New York. This appears to be the only case reported since the promulgation of the Rules which considers the question of the absence of a venue allegation in certain counts of an indictment.

*United States v. Weishaupt*, 167 F. Supp. 211  
(E. D. N. Y. 1958).

The court said:

“There is no merit in the defendant’s claim that Count 5 of the indictment is defective because of its failure to state the venue of the alleged crime. Rule 7(c) of the Federal Rules of Criminal Procedure prescribes the ‘Nature and Contents’ of an indictment. It neither expressly nor impliedly provides that the venue of the alleged offense be stated. It requires, in pertinent part, that ‘the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. \* \* \* It need not contain \* \* \* any other matter not necessary to such statement.’ Even error in or the omission of the statute or regulation alleged to have been violated, provision for the citation of

which is made in the Rule, is not ground for the dismissal of the indictment, except for reasons not here relevant. Count 5 charges the commission of an offense against the United States. The information claimed to be lacking in the indictment may be obtained through a bill of particulars under Rule 7(f) of said Rules.”

*United States v. Weishaupt, supra*, at p. 212.

In the case at bar, appellants were fully advised almost one and one-half years before the trial that the venue of the crimes charged in the indictment was in each count in the Central Division of the Southern District of California. They can claim no surprise, therefore, that the proof adduced at trial established *that venue* for each count, since the prosecution is held to its bill of particulars.

*United States v. Neff*, 212 F. 2d 297, 309 (3 Cir. 1954).

The *Weishaupt* case quite correctly stresses that venue is not one of the elements of the offense. It is merely the *forum* where the defendant must be tried, unless he waives this procedural right. The defendant's right, therefore, is to be tried in the proper venue, not to be *charged* with the proper venue. It is clear that venue is waivable.

*Rodd v. United States*, 165 F. 2d 54, 55 (9 Cir. 1948);

*United States v. Jones*, 162 F. 2d 72, 73 (2 Cir. 1947).

It is equally clear that the essential elements of the offense which must be included in the indictment pursu-



ant to Rule 7(c) must be pleaded and are not waived by failure to move for dismissal prior to trial.

*Carlson v. United States*, 296 F. 2d 909, 910 (9 Cir. 1961).

Each of the essential facts constituting the offense charged must not only be pleaded, each must be proved beyond a reasonable doubt.

*Holland v. United States*, 348 U. S. 121, 138 (1954).

However, the facts evidencing that the trial is in the proper venue need not be established beyond a reasonable doubt.

*Dean v. United States*, 246 F. 2d 335, 338 (8 Cir. 1957);

*Blair v. United States*, 32 F. 2d 130, 132 (8 Cir. 1929);

*Cf. United States v. Karavias*, 170 F. 2d 968, 970 (7 Cir. 1948).

In the *Jones* case, *supra*, Judge Frank held that a defendant waived his constitutional right to a trial in the proper venue by going to trial on an indictment which indicated on its face that it was returned in the wrong venue. The following year, Judge Frank wrote the opinion in a case in which the indictment alleged the proper venue but the proof adduced at trial showed that the venue was in another district. Judge Frank held that the defendant did not impliedly waive his right to insist on a trial in the proper district by going to trial on that indictment, since the indictment did not put him on notice of error. He suggested, however, that a waiver similar to the one in *Jones*, *supra*, might have

been found to exist, “[I]f, during the trial, defendant had *in some manner* been put on notice that the government intended to rely on that New York City offer as a crime, for which he was being tried. But here there was nothing to notify him. . . .” [Emphasis supplied.]

*United States v. Michelson*, 165 F. 2d 732, 734 (2 Cir. 1948), affirmed 335 U. S. 469 (1948).

It follows from this dictum that notice of venue might be communicated to a defendant by some medium other than the indictment. That is exactly what was done here in the bill of particulars, with respect to the two counts of which Carbo complains, and in conformity with the *Weishaupt* ruling.

The correctness of the foregoing analysis in the light of Rule 7(c) is confirmed by the traditional distinction which has been recognized between the unwaivable requirement to establish *subject matter* jurisdiction in the district court by an indictment which alleges the essential elements of an offense against the United States and the waivable right to be tried in the forum of the crime. 18 U. S. C. §3231 confers jurisdiction to “the district courts of the United States” over the subject matter “of all offenses against the laws of the United States.” An indictment which fails to charge every element of an offense, fails to state an “offense against the laws of the United States.” However, no *jurisdictional* defect exists if the wrong venue is invoked. This is not an error subject to collateral attack.

*Mahaffey v. Hudspeth*, 128 F. 2d 940, 942 (10 Cir. 1942).

In this case, appellants have shown no error of venue at all. Their right to be tried in the forum of the crime was respected. Their convenience in being informed long in advance of trial of the theory of venue, was satisfied. Since Rule 7(c) does not require venue to be pleaded in the indictment and provides for a bill of particulars for elaboration of the charge when cause is shown, the bill of particulars eliminated any problem of surprise at trial. Having shown no prejudice in connection with venue, appellants' contentions should be rejected.

## B. The Trial.

### 1. Gibson's Motion for a Trial Severance Was Properly Denied.

Gibson raises the frivolous contention that he was not properly "joined as party defendant". [Gibson's Op. Br. 44-45.] Presumably, he is referring to the denial of his pre-trial motion for a trial severance. [I C.T. 192-193, 210.] However, considering Gibson's concession of the obvious, to wit, that the denial of a severance of defendants for trial is in the sound discretion of the trial court, and applying that test to his brief, which fails to suggest a single *fact* tending to show an abuse of that discretion, it is difficult to understand why he has even raised this contention on appeal.

Rule 14, F. R. Crim. P.

Indeed, the only severance case cited by Gibson, establishes the futility of his position.

*Schaffer v. United States*, 363 U. S. 511 (1960).

The facts of *Schaffer* raise an arguable case for severance, since the Government failed to prove the one con-

spiracy count which connected the other five counts and all defendants. Still, the Supreme Court held that the district court did not abuse its discretion in refusing a severance once the conspiracy count had been dismissed and the motions for severance made.

Here, only a pre-trial motion was made. The indictment is one homogenous pleading which is connected by one overriding extortion scheme. The substantive counts are also pleaded as overt acts in the two conspiracy counts on which Gibson was convicted. Although Gibson contended in his pre-trial motion that "much of the testimony in the trial will be inadmissible and not applicable to this defendant", without suggesting any basis in fact for this assertion, he has abandoned this contention in his Opening Brief. [I C.T. 193.] The Statement of Facts, above, demonstrates why he can no longer urge this point.

Cases presenting stronger factual showings for severance of defendants have held that the motion was not well taken.

*United States v. Postma*, 242 F. 2d 488, 493 (2 Cir. 1957), *cert. den.* 354 U. S. 922 (1957);

*United States v. Varlack*, 225 F. 2d 665, 673 (2 Cir. 1955);

*United States v. Cohen*, 124 F. 2d 164, 165-166 (2 Cir. 1941), *cert. den.* 315 U. S. 811, *reh. den.* 316 U. S. 707 (1942);

*United States v. Boyance*, 30 F.R.D. 146 (E. D. Pa. 1962).

The propriety of Judge Tolin's ruling on Gibson's pre-trial motion should be tested by the facts apparent in the record at the time he denied the motion. By this

standard his ruling was correct. However, if we test the ruling with the advantage of hindsight, a severance of Gibson's trial would have been an unconscionable imposition upon the judicial process. The trial required more than three months of the court's time. Seventy-seven witnesses were brought from all parts of the nation. Virtually none of the prosecution's evidence was wholly inapplicable to Gibson's case. All defendants were convicted on both conspiracy counts. Thus, in retrospect, the record demonstrates the wisdom of the ruling. A severance of Gibson would have amounted to an abuse of discretion.

## 2. Selection of Jury.

Gibson alleges error in the selection of the venire and in the impanelling of the jury. [Gibson's Op. Br. 48-50.] He fails, however, to comply with Rule 18(a) (d) by pointing out in which particular the District Court erred in the record and where he urged the grounds, now urged to this Court, as a basis for reversal to the trial judge. [Gibson's Op. Br. 22.]

### (a) *No Showing Was Made of Systematic Exclusion of Negroes From Venire.*

On the first day of trial, while the *voir dire* of the *veniremen* was in progress, counsel for Gibson moved to quash the *venire* alleging the systematic exclusion of Negroes therefrom. [1 R.T. 75.] The case had been pending against Gibson for seventeen months (since September 22, 1959, when the indictment was returned), yet no pre-trial motion raising this question had been made when the issue, if in fact there were an issue, could be conveniently explored by the Court. No



affidavit was ever filed in support of the oral motion. Gibson's counsel admitted that the only basis for the motion was his visual observation that no Negro *veniremen* appeared to him to be in the courtroom. [1 R.T. 75.]

Judge Tolin pointed out to Gibson's counsel that he might have taken pains to see that Negroes were in that particular *venire* that morning if Gibson's counsel had requested it in advance. [1 R.T. 76-77.] The Court further informed counsel that this was a fresh panel commencing a new term that week, with which he had had no experience; however, the prior jury panel, which had terminated its services the preceding week, had many Negroes on it who had sat on juries in Judge Tolin's court. The Court properly denied the untimely and unsupported motion. [1 R.T. 76-77.]

At no time did counsel produce any written motion or any evidence to support his contention that Negroes had been systematically excluded from jury service. Without informing the Court when he would be prepared to do so, counsel offered to present proof, based upon the 1960 census statistics, that it would be impossible to "draw jurors in accordance with constitutional requirements, without coming up with some Negro jurors in 50." [1 R.T. 81-82.]

Gibson never produced any proof in support of his contention, although the Court indicated at that time that evidence would be taken from the Clerk and Jury Commissioner during the afternoon session that day. [1 R.T. 82-85.] That afternoon, after the Court called and questioned the Clerk of the Court and his Deputy, and made available the Jury Commissioner,

counsel for Gibson declined the Court's express invitation to cross-examine the witnesses. [1 R.T. 89-96.]

The testimony of the Clerk of the Court, John Childress, and his Deputy, Maxine Lewis, established that systematic exclusion of Negroes was not practiced in the selection of the *venire* in this case any more than it was practiced in the same Court in *United States v. Local 36 of International Fishermen*, 70 F. Supp. 782 (S. D. Cal. 1947). In that case Judge Hall carefully reviewed the practice of selecting the jury *venire* in the Central Division of the Southern District of California, and found no violation of any Constitutional provision, statute, or rule. In fact he found that there was not even a serious question about systematic exclusion of Negroes because of the frequency with which Negroes appeared as jurors in the District Court in Los Angeles. [*Id.* at p. 792.]

Judge Hall's careful analysis of the practice in Los Angeles was affirmed by this Court.

*Local 36 of Internat'l Fishermen v. United States*, 177 F. 2d 320 (9 Cir. 1949), *cert. den.* 339 U. S. 947 (1950).

These opinions applied the reasoning of the Supreme Court authorities cited by Gibson and concluded that the practice followed in the Southern District of California, Central Division, was lawful. The testimony of the officials of the same court in this case conclusively show that no group: ethnic, social, economic, or otherwise—is systematically or intentionally excluded from the petit jury *venire* in the Southern District of California, Central Division.

If Gibson had been prepared to prove at the proper time that which he said he could prove by statistics (and he was not prepared), still he would not have established his allegation of systematic exclusion of Negroes. He would only have established that the Negro population in the Los Angeles metropolitan community was not proportionately represented in the courtroom on a particular morning. He certainly would not have established that Negroes do not regularly appear as jurors in the District Court in Los Angeles. Judge Tolin's own observations in the record are to the contrary. [1 R.T. 76-77; 29 R.T. 4342-4344.]

The fallacy of Gibson's position, as Judge Tolin immediately pointed out to his counsel when the motion was first made [1 R.T. 76], is that a defendant in a federal criminal case has no constitutional or statutory right to have any political, economic, social, or national group represented on the *venire*. His rights are satisfied if the jury is impartial (Gibson does not claim that it was not) and if no group was systematically excluded from the *venire*. None was.

*Local 36 of Internat'l Fishermen v. United States, supra*, at p. 34;

*Long Yin v. United States*, 118 F. 2d 667, 668 (9 Cir. 1941);

*Bary v. United States*, 248 F. 2d 201, 206 (10 Cir. 1957);

*Cf. Ballard v. United States*, 329 U. S. 187 (1946);

*Thiel v. United States*, 328 U. S. 217, 220 (1946).

Answering a similar allegation against a grand jury, the Supreme Court said:

“ . . . Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. . . . ”

*Akins v. Texas*, 325 U. S. 398, 404 (1945).

Although Gibson contends in his Opening Brief that the *venire* was not selected in accordance with 28 U.S.C. §864, he fails to state where he made this contention in the trial court, just as he fails to cite any authorities which cast any doubt upon the procedure followed in calling the *venire*.

*Christianson v. United States*, 226 F. 2d 646, 654 (8 Cir. 1955).

(b) *The Jury Was Properly Impanelled.*

Next, Gibson alleges that the Court erred in the impanelling of the twelve jurors and three alternates, but fails to cite where in the record he preserved this point. His objections in this connection are two; both rely on failure to comply with Rule 24, F. R. Crim. P.

The five appellants were granted more peremptory challenges than the number to which they were entitled as of right. They had ten challenges to exercise jointly [2 R.T. 261], each appellant had one additional peremptory challenge that was personal to him [2 R.T. 261], and Gibson and Sica were granted an extra personal challenge each [2 R.T. 266-267, 259-261] because of special requests by their counsel. Thus, the defense had seventeen peremptory challenges, seven more than

the requirement of Rule 24(b), while the Government (contrary to Gibson's unsupported assertion that the prosecution was allowed ten [see Gibson's Op. Br. 50]) was allowed only the six peremptory challenges provided by the rule. [2 R.T. 237-238.]

Gibson's counsel objected to the system of simultaneous written peremptory challenges employed by Judge Tolin and many other federal judges. [2 R.T. 235-240, 262.] He alleges in his Opening Brief that this procedure violates Rule 24, F.R. Crim. P., in that it fails to provide the minimum number of peremptory challenges. He fails to explain why. He also fails to overcome the decisions of the Supreme Court and this Court which have sustained the procedure of impaneling followed by Judge Tolin.

*Pointer v. United States*, 151 U. S. 396, 412 (1894);

*Hanson v. United States*, 271 F. 2d 791 (9 Cir. 1959) (sustaining judgment entered by Judge Tolin where this same procedure was used).

Gibson's last point in this connection, that he was denied sufficient peremptory challenges in selecting the three alternate jurors, was not brought to the attention of the District Court at the appropriate time; therefore, he is barred from raising it here.

*Christianson v. United States*, *supra*.

### 3. Sufficiency of the Evidence.

"The appellant's first contention raises a question of the sufficiency of the above evidence, which is both direct and circumstantial. We must view this



evidence in the light most favorable to the government, including the reasonable inferences to be drawn therefrom. . . .”

*Cape v. United States*, 283 F. 2d 430, 433 (9 Cir. 1960).

(a) *The Evidence Is Sufficient to Sustain the Jury's Verdict.*

Reference is made to the Statement of Facts set forth above which amply demonstrates, with citations, that sufficient proof to warrant conviction was adduced against each of the appellants.

The sufficiency of evidence question has been tested by two experienced judges: the late Honorable Ernest A. Tolin, who denied motions for judgment of acquittal of all appellants, except Dragna, which matter was under submission at the time of Judge Tolin's demise; and the Honorable George H. Boldt, who, after studying a 7,828 page trial record, prepared a 1,320 page summary thereof, and denied motions for new trial for all appellants, as well as the pending motion for judgment of acquittal of appellant Dragna. Of course, Judge Boldt actually weighed the evidence, going well beyond the sufficiency question now before this Court. Judge Boldt found that.

“On the whole record this court is fully satisfied every defendant was accorded a fair trial, free from prejudicial error, and that the evidence thoroughly supports the verdict in every essential particular as to each defendant. The contentions of defendants which entailed the most exhaustive consideration of the record and analysis of authority are those

relating to the credibility of government witnesses, the admission in evidence of the recordings and their playing to the jury. *The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseth or both. Their testimony, in all essential particulars was fully and convincingly corroborated.* Nor is there any doubt as to the admissibility of the recordings and of the propriety of their being played under the circumstances shown by the record. This court is now fully satisfied there is no substantial merit in the contentions referred to which would support a finding of prejudicial error.” [VI C.T. 1446-1448, Memorandum Order of Judge Boldt, dated November 28, 1961 (Emphasis supplied).]

(b) *There Is Substantial Evidentiary Corroboration, Both Circumstantial and Direct, of the Victims' Testimony.*

No attempt will be made in this section to restate all of the evidence sustaining the appellee's view of this case. Since the testimony of Leonard and Nesseth is set forth in great detail in the Statement of Facts, it is the purpose of this section to demonstrate the extent to which much of the evidence provided by the victims was corroborated by material facts beyond the knowledge of either.

Although appellants endeavor to create the impression that Leonard's testimony stood alone, uncorroborated by other evidence, this is contrary to fact. Not only was Leonard corroborated by Nesseth, but, as Judge Boldt pointed out in his Memorandum Order denying motions for new trial, the testimony of Leonard

and Nesseth “in all essential particulars was fully and convincingly corroborated.” [VI C.T. 1448.] Of course, the statement of appellant Gibson in his brief that “the prosecution itself had so little confidence in Leonard’s capacity for truth that he was not submitted as a rebuttal witness . . .”, is itself an untruth. [Gibson’s Op. Br. 37.] Not only did appellee have complete confidence in Leonard’s truthfulness, but he was, in fact, called as a rebuttal witness. [43 R.T. 6348-6429.] Since this testimony comprises some eighty-one pages, it is hard to see how this was overlooked by Gibson.

Appellant Gibson took the stand in his own defense and testified that in 1949, while attorney for retiring heavyweight champion Joe Louis, he worked out a business arrangement, the object of which was to capitalize on Louis’ heavyweight title and reputation by using Joe Louis Enterprises, an existing corporation, to enter into contracts with the leading contenders for Louis’ title. [32 R.T. 4706-4710.] A series of negotiations ensued which led to the founding of the International Boxing Club of New York, and the International Boxing Club of Illinois. The sum of the testimony clearly indicates that Gibson’s purpose, after joining forces with the Norris-Wirtz interests, was to monopolize the promotion of championship prize fights and to control the destiny of world champions and top contenders. [32 R.T. 4708-4720.] See also *United States v. International Boxing Club*, 358 U. S. 242 (1959), and Judge Sylvester Ryan’s opinion in the United States District Court for the Southern District of New York, for some useful background concerning “what everyone knows” [*United States v. Compagna, supra*, 146 F. 2d at 529] in the boxing world. The

Court will note that Judge Ryan's decision, referred to by Gibson in his testimony, was handed down on March 8, 1957, and that this decision handicapped Gibson in his ability to perpetuate I.B.C. control of championship boxing as well as television promotion, and the I.B.C. was unable to enter into so-called "exclusive service contracts." [32 R.T. 4724-4728.]<sup>12</sup>

*United States v. International Boxing Club of N. Y.*, 150 F. Supp. 397 (S. D. N. Y. 1957), affirmed 358 U. S. 242 (1959).

Thus, if Gibson was to maintain his control he had to substitute other procedures for those which were now outlawed by the courts. It is at this time that we see a closer relationship develop between Gibson and Carbo, and can appreciate the full significance of Gibson's acknowledgment on the witness stand that he used the underworld in the operation of his (I.B.C.'s) business as a type of preventive medicine and that he was unaware of the methods used by the underworld to obtain his (Gibson's) ends. [34 R.T. 5050, 35 R.T. 5131-5136, 5138.]

This testimony concerning underworld activity in behalf of the I.B.C. is corroborative of Leonard's and Nesseth's testimony that they were confronted with threats of underworld and strong-arm tactics. Moreover, Gibson admitted certain dealings with Carbo which in themselves characterize the sinister nature of their

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<sup>12</sup>As the Supreme Court pointed out in *International Boxing Club of New York v. United States*, *supra*: "[I]n amassing their empire, appellants obtained control of champions in three divisions [heavyweight, welterweight, and middleweight]. The choice given a contender thereafter was clear, *i.e.*, to sign with appellants, or not to fight." [358 U. S. 242 at p. 248.]

relationship: (1) periodic payoffs to Carbo in the name of Viola Masters (Carbo's wife's maiden name) [32 R.T. 4759-4773], (2) a payoff to Palermo on May 15, 1959, at the culmination of the conspiracy: a \$5,000 check and a \$4,000 check payable to Palermo and drawn at Gibson's direction [Ex. 33; 33 R.T. 4949-4955], (3) significant contacts between Gibson and Carbo [see *e.g.* 30 R.T. 4516-4520; 32 R.T. 4757-4759] though Carbo had no legitimate connection with boxing.

When one appreciates Gibson's approach to the business of the I.B.C. and the methods which he was using shortly before the offenses comprehended by this indictment, then the testimony of Leonard and Nesseth becomes irrefutable. Gibson, the operating head of the I.B.C., a lawyer and a person with sufficient polish to deal with respectable and important business personalities, had to keep his relationship with the underworld in the background. Insofar as Leonard and Nesseth were concerned, Gibson could not appear to be openly tied to Carbo and Palermo. They could draw the inference, but it would have to remain an inference only until independent evidence was produced, as it was during the trial of this case. The pressures exerted upon Leonard and Nesseth were rooted in Gibson's business policy and the conspiracies of which he stands convicted were a natural consequence of Gibson's relationship with Palermo and Carbo.

In evaluating circumstantial corroboration of Leonard's and Nesseth's testimony, it is important to note that they could not have known of the frantic activity in which Carbo, Palermo, Sica and Dragna engaged during the period April 24, 1959, through June 4, 1959.



[See Statement of Facts, above.] Similarly, Leonard and Nesseth could not have known about motel and hotel registrations under false names and false or non-existent addresses, *e.g.*: at the Blue Mist Motel [Ex. 107-A], the Chateau Resort Motel [Ex. 108-A], the Last Frontier Motel [Ex. 168], and the Beverly Hilton Hotel. [Exs. 84-A and 85-A.] Nor could they have known of all the telephone activity among the conspirators, revealed by the toll slips in evidence. [See Appendix A, below.]

All of the hotel and motel registrations referred to above illustrate the furtive and surreptitious activity of the appellants Carbo and Palermo, during the period of the conspiracy, their passion for anonymity, their insistence upon keeping their exact whereabouts unknown and upon covering their trail as they moved from place to place, as described by the testimony of numerous witnesses. [5 R.T. 624; Ex. 101-A for Ident., at pp. 24, 56; 20 R.T. 2835-2837; 44 R.T. 6575-6578; 5 R.T. 635-643; 17 R.T. 2559; 39 R.T. 5852, 5855; 22 R.T. 3228; 23 R.T. 3366, 3375; 30 R.T. 4516-4520; 33 R.T. 4925, 4939-4945; 22 R.T. 3201.]

Further corroboration evidencing a common scheme and plan can be found in the testimony of Detective Anthony Bernhard who, with another detective, was working undercover in Washington, D.C., Bernhard overheard conversations between Carbo and Palermo and Carbo's order to Palermo to call the number of Lou Viscusi, manager of lightweight champion Joe Brown, to demand \$2,000 from him. Bernhard testified about Palermo's report to Carbo, after he had made the call, that Viscusi was frightened and had said he did not

have the money. Palermo announced that he had told Viscusi to "look in the drawers, you know where to find it", after which the people around Carbo laughed. [43 R.T. 6520-6521.]

Parenthetically, this not only corroborates the *modus operandi* of the conspiracy revealed by the testimony of Leonard and Nesseth, but also gives emphasis and added significance to Gibson's testimony regarding his business policy of using the underworld. [34 R.T. 5050; 35 R.T. 5131-5136, 5138.]

Leonard's testimony about the Miami meeting on January 6, 1959, is also well corroborated. Leonard testified that he was met at the airport by a man named "Mike" whom he had never seen before; that he was taken to the Blue Mist Motel, and that Palermo stayed with him. The following morning they moved across the street to the Chateau Resort Motel at Palermo's instance. Independent evidence in the form of motel registrations from the Chateau and Blue Mist Motels, referred to above, shows registration by Palermo in one motel as "George Tobias," and in the other as "Lew Gross," with different, and in each case, false addresses. [Exs. 107-A, 107-B, 107-C; Exs. 108-A, 108-B; Exs. 109-A, 109-B.] Palermo was identified in court by the desk clerk as the "George Tobias" who registered at the Blue Mist Motel [17 R.T. 2558-2559], despite Sica's attempt to mislead him by standing up when the witness pointed at Palermo. [17 R.T. 2559, line 6.] When Leonard registered for himself at the Chateau Resort Motel, he used his true identity. [Ex. 109-A.]

Furthermore, Leonard identified a photograph of Palermo and another male [Ex. 50], and explained that the man with Palermo in the photograph was the "Mike"

who had met him at the Miami airport. [5 R.T. 633-635.] Thereafter, Sergeant Moran of the St. Louis Police Department identified "Mike" as Abe Sands who had been with Palermo in St. Louis. [18 R.T. 2629.]

Thus, the connection between Palermo and Sands, known to Leonard as "Mike", was provided by an independent witness, Sgt. Moran, who had seen Palermo and Sands together in St. Louis on the night of the championship fight between Martinez and Akins in which Akins won the welterweight title. [18 R.T. 2629-2630.] Further corroboration of Leonard's testimony involving "Mike" was provided by Carmen Basilio and one of his managers, John DeJohn, who testified that someone named "Sandy or Smoky" (or "Sandy or Sparky") picked them up at a restaurant and chauffeured them to an unknown address where they quite unexpectedly were confronted by Carbo. [20 R.T. 2835-2837; 44 R.T. 6675-6676.] "Mike" or "Sandy" are unquestionably the same person, *Abe Sands*, who acted for Carbo and Palermo as chauffeur and intermediary to bring Leonard, Basilio, and DeJohn into the illustrious presence of Carbo. In each case, the person Carbo wanted to see was told that someone would pick him up because *Jim Norris* wanted to see him. [5 R.T. 624, 628; 44 R.T. 6675.] Of course, Norris was not present in either instance, only Carbo. [5 R.T. 637.] Both of the Carbo confrontations in Miami occurred in January, 1959. [44 R.T. 6675-6676; 5 R.T. 638.] Joe Sonken also identified "Mike" in the photograph as "Sandy". [21 R.T. 3018-3019.] Akins' manager, Bernard Glickman, admitted delivering \$10,000 in currency to a Carbo courier identified to him as "Mike". [29 R.T. 4270-4271.]

DeJohn testified that he visited Carbo and Palermo together at the Treasure Island Motel in February, 1959, in Miami, Florida. On cross-examination, Palermo admitted being at the Treasure Island Motel in early January, 1959, but insisted he was alone. [40 R.T. 5948-5950.] The motel records show he may have been lonely but certainly not alone, since he was occupying three rooms at the Last Frontier Motel under a false name with *four* unidentified companions. [Exs. 168, 169; 44 R.T. 6571-6573.] Present in the room, according to DeJohn, was Carbo's associate Gabe Genovese. [44 R.T. 6676.] Leonard was also confronted by Carbo and Gabe Genovese when he visited Palermo at the Chateau Resort Motel in Miami, Florida, on January 6, 1959. [5 R.T. 641-642.]

Palermo's criminal intent is reflected by the records which he made on his trip to Los Angeles on May 1, 1959, at the time when this conspiracy was about to explode. He registered at the Beverly Hilton Hotel under the name of George Tobias. [39 R.T. 5857; Exs. 84-A, 84-B, 85-A-85-C.] Thereafter, on the night of May 4, he received a telephone call from Truman Gibson; significantly Gibson called him person-to-person under Palermo's alias of "George Tobias." [31 R.T. 6004, 6030-6031.] Palermo and Dragna de- of the first persons he met in Los Angeles after leaving Gibson in Chicago that day was Dragna. [40 R.T. 6004; 6030-6031.] Palermo and Dragna described this meeting as accidental. The events of the ensuing week belie their testimony. Among other things, Palermo had not seen Dragna in many years. [38 R.T. 5641-5642.] After consulting with Dragna, Palermo met with Sica, and it is *undisputed* that Pa-

lerno asked Sica to intercede in the situation involving Leonard and Nesseth and to bring pressure to bear upon them even though he (Sica) had no previous connection with the matter. [36 R.T. 5381-5395; 37 R.T. 5482-5487.]

It is also *undisputed* that Sica and Palermo talked to Leonard that night (or the following night) in Palermo's room at the Beverly Hilton Hotel and that Sica took Palermo's side in the heated discussion which occurred there. In the light of this, Leonard's version of the conversation and the events leading up to it [5 R.T. 684-692; 6 R.T. 719-722] was the proper one for the jury to believe. Moreover, even Sica testified that he had contacted Leonard on Palermo's behalf (although Sica and Palermo had not seen each other in years) and told Leonard that he, Sica, wanted to see him in the lobby of the Beverly Hilton Hotel. Sica admitted on the witness stand that he did not tell Leonard why he wanted him to come to the Beverly Hilton Hotel and that Leonard walked into the lobby unaware of Palermo's presence in Los Angeles; that Sica then took Leonard upstairs to Palermo's room where Sica and Palermo laid down the law to Leonard. Thus, Sica's role *as an enforcer* is established beyond doubt.

When pressed to explain why he visited the Legion Stadium on May 6, 1959, Sica had no rational explanation. [37 R.T. 5497-5499.] Sica's inability to explain his presence at the Legion is quite comprehensible when one considers the testimony of Don Chargin and Manuel Dros in connection with Sica's efforts to hurt Leonard by intimidating Chargin who was investing new capital in Leonard's failing business. Sica had Willie Ginsberg call Dros to instruct Dros to call a certain



number from a telephone booth. When Dros called that number, Sica answered. Sica asked where he could get in touch with Chargin, and Dros said he did not know. Sica then told Dros that he was working “for the wrong people”. One month later, according to Chargin, the day before he was planning to fly to Los Angeles, he received an anonymous telephone threat warning him to stay out of Hollywood, and the caller referred to a recent mishap to Leonard. [15 R.T. 2205-2206, 2237, 2239.]

The bridge between these two occurrences is found in the Daly-Leonard conversation on May 14 at the Ambassador Hotel in which Daly told Leonard that the Sicas would have an innocent explanation of the whole thing, that: “The first thing they are going to say to the cops, ‘somebody owes my friend, my friends, money and I only asked them to pay it.’” The stories told by Dragna and Sica on the stand read like Daly’s script. Daly also explained how Chargin and Livingston would be frightened away so that Leonard would be unable to obtain necessary capital for the failing Club, “Oh, they’ll get somebody up around San Francisco to go see him and tell him to lay off you people. You know. So it’ll make the guy think a little bit, too, you know.” [Exs. 100-102, 176, 101-A for Ident. at p. 49.]

As a matter of fact, the entire Daly-Leonard conversation [Exs. 100-102, 176, 101-A for Ident.] is corroborative of Leonard’s and Nesseth’s testimony with regard to what was happening, and Daly not only confirms the existing situation in boxing, but points out that this sort of thing has been going on for years, “Carbo don’t give a fuck as long as they’re—they keep

their income up. That's all. That's how they live. And that's how they are going to live as long as they can get away with it." [*id.* at p. 11.] In this connection, Palermo was asked on cross-examination: "There was nothing wrong with what you were doing, was there?" He replied, "I don't believe so. We have been doing this for years. This is the first time this kind of case ever came about." [40 R.T. 5985.]

The very fact that Sica and Dragna, who until May, 1959, had nothing whatsoever to do with the situation, came into the picture, corroborates Leonard's testimony with regard to threats of Carbo that he had friends on the West Coast who could enforce his will. Note that Daly, Parnassus, and Underwood *coincidentally* happened to meet Sica at Dorando's Restaurant the week after Sica and Dragna visited Leonard. [26 R.T. 3734-3734d; 28 R.T. 4108-4111.]

There is dramatic corroboration of Leonard's testimony concerning the telephonic threats from Carbo. On April 28, 1959, Leonard and Nesseth were in Leonard's office at the Hollywood Legion Stadium. They were discussing the pressure which Carbo was exerting to get Nesseth to give up his responsibilities as Jordan's manager. The telephone rang and, after a few minutes of stammering responses, Leonard turned white, hung up the telephone, ran into the ladies' room across the hall, and vomited. [Ex. 21.] Leonard testified that during this call Carbo had told him that he (Carbo) had friends on the West Coast, that they would meet at the crossroads, that Leonard would get hurt, and when he said hurt—he meant dead; that he would gouge Leonard's eyes out. [5 R.T. 680-681; 13 R.T. 1818-1824.]

Some question was raised by counsel for Carbo as to whether Nesseth could have returned from New York in time to be in Leonard's office on April 28 in time to witness this call. The making of the call from one of Palermo's Philadelphia telephones is reflected by Exhibit 21. Nesseth's testimony that he was present, having returned by plane from New York, is corroborated by Exhibits 104-A and 105-A, hotel registrations for Mr. and Mrs. Nesseth and Don Chargin, showing that the Nesseths and Chargin checked out of the Hotel Edison in New York City at 5:22 p.m., April 27, 1959. The record was somewhat confused by appellee's mistake in introducing Exhibit 106-A which pertains to the following year and was erroneously and superflously offered and received into evidence. [Exhibit 106-A is a registration of Chargin at the Hotel Edison in May, 1960, one year later, and has nothing to do with the facts of this case.]

Further corroboration of this Carbo telephonic threat is found in the fact that Leonard testified that within a few minutes of Carbo's call the telephone rang again. This time Palermo was on the line, trying to calm Leonard down, obviously afraid that Leonard would do something intemperate, such as going to the police. Nesseth corroborated the fact that the second call was received and that Leonard said it was from Palermo. [13 R.T. 1818-1819, 1826-1827.] A telephone toll slip [Ex. 22] corroborated both Leonard and Nesseth. It shows a call within 5 minutes of the end of the Carbo call. Palermo denied that he ever was at the Cori house with Carbo. [40 R.T. 5999]; however, John DeJohn saw Palermo, Carbo and Tony Ferrante

together in a private residence in Philadelphia in April or May, 1959. [44 R.T. 6577-6578.]

Of course, substantially all of the testimony in the record evidences the basic plot about which Leonard and Nesseth testified, namely, Palermo's unwarranted and illegal concern over the future of Don Jordan, a concern rooted in Carbo's desire to main his criminal monopoly of the welterweight title; and Gibson's silent working arrangement with Carbo and Palermo. Gibson's criminal complicity with them was calculated to guarantee that nothing would happen to upset his plans for the broadcasting of the title fights in December, 1958, and April, 1959, on nationwide television.

The testimony of Sgt. Moran and Sam Muchnick about the Jordan-Akins fight in St. Louis on April 24, 1959, corroborates Leonard and Nesseth. Beyond question, Nesseth was in fear when he went to St. Louis and contacted the St. Louis Police. Sgt. Moran testified that when Nesseth saw Palermo, he was scared. [18 R.T. 2626, 2628.] The testimony of Muchnick eliminates all doubt. Muchnick testified that Palermo dared to go to his (Muchnick's) office and ask him to calculate 15 per cent of the purse. Then he inquired of Muchnick whether Nesseth had left this money for him. [18 R.T. 2600-2602.] In addition, Nesseth testified that Palermo came to his hotel room, demanded money from him, and when he rebuffed Palermo, they engaged in a heated discussion during which Palermo said that some *big people were going to be upset*. [13 R.T. 1808-1813.] Palermo admitted, on the witness stand, that he made this visit to Nesseth after unsuccessfully attempting to persuade

Gibson to join him there, *and that he discussed with Nesseth his claim to part of Jordan's purse.* [39 R.T. 5820; 31 R.T. 4617-4618; 39 R.T. 5823.] *This admission by Palermo is conclusive of his guilt, because under no reasonable construction of the evidence was Palermo entitled to any of Jordan's purses.* (It is undisputed that Palermo had nothing to do with the promotion of this fight.) Moreover, Don Chargin and Harvey Livingston overheard Palermo tell Nesseth, "The man isn't going to like this." [15 R.T. 2225; 16 R.T. 2325.] Carbo was often referred to as "the man" as Palermo admitted. [40 R.T. 5996-5997.] In the context of this conversation, it was clear that Carbo was "the man". Furthermore, the whole record reflects that it was of Carbo that everyone was in fear and that a threat, either directly from Carbo, or one transmitted in his name, was certain to induce fear. In this connection, Gibson admitted that he considered that "pressure" was being applied to him when Chris Dundee, the Miami fight promoter, called him for a favor and then put Carbo on the line. [33 R.T. 4939-4945.]

The recorded telephone conversation [Ex. 177] between Leonard and Palermo on the evening of May 5, 1959, the night before Sica and Palermo appeared at the Hollywood Legion Stadium [Exs. 96, 97, 96-A for Ident.] provides proof to a certainty of Carbo's ("Our friend") joint masterminding of this extortion plot with Gibson. It also reveals that Carbo and Gibson were applying simultaneous pressure of economic attrition and of threats of violence to Leonard and Nesseth. In this call [Ex. 177], particularly note Palermo's admission of earlier telephone threats.



The only time Palermo used his own name to register during the entire period of the conspiracy was when he was staying in the Bismarck Hotel in Chicago (owned by Norris & Wirtz) at the expense of the I.B.C. [12 R.T. 1732, 1737; Exs. 70, 71, 72, 73; 40 R.T. 6002; 39 R.T. 5856.] When he left the sanctuary of Gibson and the I.B.C., he would resort to an alias, either because he was travelling with and acting for Carbo (as in Miami) or travelling on illicit business for Carbo (*e.g.*, at the Beverly Hilton Hotel). Nor would Carbo ever register at a hotel or motel under his own name. Despite his use of the Chateau Resort Motel in Miami as a meeting-place with Leonard, Carbo's name was not to be found on the register. Boxing people who admitted knowing Carbo for many years insisted that they did not know where to call him or at what address to visit him. If they were taken to Carbo's "home", it was under clandestine circumstances like those experienced by Basilio and DeJohn. All of this corroborates Leonard's testimony that Palermo remonstrated with him for using Carbo's name over the telephone [See Ex. 177 where Palermo warned Leonard, "No names!"]

The \$1725 extortion payment to Palermo took a circuitous route under Palermo's guidance, demonstrating his consciousness of guilt. Clearly the appellants attempted to obscure and conceal the delivery of these funds to Palermo. They would have succeeded if it were not for the fact that the witness Sonken was pinned down by the F.B.I. who had discovered that Sonken had made false entries to help cover Palermo's tracks. Thus, it was proven by evidence independent of Leonard's testimony, that (a) Leonard drew a check

in the name of Clare Cori (at Palermo's direction) [Ex. 53]; (b) that the check was mailed to Clare Cori's residence in Philadelphia [Exs. 54, 55]; (c) that this residence, and its telephone, were commonly used by Palermo and that he gave this number as one where he could be reached [Ex. 52; 39 R.T. 5883-5885]; (d) that Palermo's wife, Clare Cori, actually received the check by registered mail and signed a return receipt for it [Ex. 54]; (e) that the check was transmitted to Miami to Palermo [39 R.T. 5836; 21 R.T. 3012-3014]; (f) that Palermo asked Sonken to cash the check [21 R.T. 3012]; (g) that Sonken deposited the check for collection and wired Leonard's Los Angeles bank on which the check was drawn [21 R.T. 3013]; (h) that when he was advised that there were sufficient funds to cover the check, he drew another check to the order of "Carmen Cossara" for \$1700, indorsed the name Carmen Cossara on the check and gave the proceeds to Palermo [21 R.T. 3014-3016; Ex. 124; 39 R.T. 5827]; (i) that Sonken kept \$25 for *telegraph costs* [21 R.T. 3023]; and (j) that "Carmen Cossara" was a fictitious person and he, Sonken, knew it was a fictitious person. [21 R.T. 3020.]

To make it additionally clear that all of the parties involved were treating this as if it were the fruits of a crime which should not be accurately reflected, Sonken lied to the F.B.I. when he was first interviewed concerning this matter. [21 R.T. 3046-3050; 42 R.T. 6272-6274, 6276-6279.]

The timing of this check corroborates Leonard's testimony that it was a percentage of Jordan's purse in the Gutierrez fight held January 22, 1959. The

check itself, bearing the date January 27, 1959, corroborates Leonard's testimony about the conversations with Carbo and Palermo on January 27, 1959, during which Carbo and Palermo threatened him with violence if he did not send 15 per cent of Jordan's purse. This call was from a telephone booth in response to a message which Leonard received at his home to call "Frank" at the "Palermo Hotel". [5 R.T. 656] The "Palermo Hotel" was Clare Cori's residence and "Frank" was either Palermo or Carbo. [Note the reference to Carbo as "Mr. Frank" in Bernhard's testimony: 43 R.T. 6520.] Gibson admitted that Palermo had also referred to himself on the telephone as "Mr. Frank". [29 R.T. 4026.]

Nesseth was with Leonard when Leonard returned the call from a telephone booth, and Nesseth remembered the call because he had to obtain a lot of quarters for Leonard. [13 R.T. 1796.] Leonard's and Nesseth's testimony was strongly corroborated by the F.B.I. when they located Exhibit 13, a telephone toll slip which, on its face, showed that 18 quarters, 3 dimes, and 2 nickels were deposited in the public telephone located in a Hollywood drug store for a call to Clare Cori's residence in Philadelphia, the same place where the check was sent. [Exs. 53, 54, 55.]

Corroboration of Leonard's fear, arising out of Carbo's and Palermo's demand that he send the money forthwith on January 27, 1959, is to be found in the fact that Leonard back-dated the Clare Cori check [Ex. 53] to *January 27, 1959*, the date of the call, rather than dating it February 6, the date he sent it. [Reflected by the date February 6, 1959, on the

postal registration form, Ex. 55.] When Palermo pressed him for the money a day or two before February 6, 1959, Leonard told him that his son had mailed it without postage on January 27, 1959, the day of the call from Carbo and it had been returned, so he would have to mail it again. [5 R.T. 664.]

Gibson's testimony further reveals the pressures being exerted by Palermo and Carbo to obtain their illegal share of the proceeds of the Gutierrez fight from Jack Leonard. He admitted, on cross-examination, that Palermo had started badgering him on the telephone immediately after the Gutierrez fight in his (Palermo's) attempts to get in contact with Leonard. [33 R.T. 4890-4892.] Gibson even admitted that Leonard told him in early February, 1959, that he had to have money to give to Palermo, but he denied that Leonard told him why he needed the money. [37 R.T. 4892-4894.] Gibson took this position at trial because of the "story" concocted by the appellants concerning a mythical agreement between Palermo and Leonard to purchase a Mexican fighter named Toluca Lopez. This story, rejected by the jury, was apparently contrived by the appellants to explain the incontrovertible payment of \$1725 by Leonard to Palermo by check. [Ex. 53.]

The testimony of Dragna and Palermo was calculated to give form and substance to the Toluca Lopez story. It was Palermo's contention that the \$1725 check was partial repayment of a supposed \$4,000 advance made by Palermo to Leonard in order to purchase Toluca Lopez. Of course, Gibson required a cover story for his \$1800 check from Chicago Stadium

Corporation to Leonard. [Ex. 56.] He would be admitting the existence of the conspiracy if he admitted that he sent this check to Leonard pursuant to his agreement with Nesseth and Leonard of October 23, 1958, that he would bear the monetary expense of the demands of Carbo and Palermo, if Nesseth and Leonard would merely agree to Carbo's demand in order to avoid cancellation of the December 5, 1958, title fight. Therefore, Gibson concealed the true purpose of this check in his corporate records by attributing it to an advance on the Porterville promotion. [Exs. 66, 67 and 68.]

Gibson remained faithful to this story when he took the witness stand. However, the testimony of James Ogilvie, the person in charge of the books at the Hollywood Legion Stadium, demolished Gibson's "Porterville advance" story. Ogilvie confirmed Leonard's testimony that he (Ogilvie) issued a Hollywood Boxing and Wrestling Club check in the amount of \$1800 [Ex. 57] to Jack Leonard payable to cash, after receiving a telephone call from Gibson. Gibson had instructed Ogilvie to issue this check because Gibson was making a payment to "a friend" (unidentified) in Los Angeles. *Ogilvie testified that Gibson made no mention of an advance on a Porterville promotion.* [15 R.T. 2140-2142.]

The remains of appellants' fabrication crumbled during appellee's rebuttal case when Palermo's personal accountant, Irvin Sklar, produced his and Palermo's records underlying Palermo's 1959 federal income tax return. *These records reflected the \$1725 payment as earned income from a boxing promotion involving*



*Jack Leonard.* [Exs. 171 and 172.] Palermo's retained copy of his 1959 income tax return [Ex. 170] and an exemplified copy of the return filed by Palermo for 1959 [Ex. 174] revealed that Palermo reported his income to the Internal Revenue Service treating the \$1725 as an income, and thereby taxable, item. This was inconsistent, of course, with Palermo's testimony on cross-examination, that the receipt by him of the \$1725 check addressed to Clare Cori was *not* income but instead the partial repayment of an advance by him to Leonard. [39 R.T. 5801-5802; 40 R.T. 5970; 39 R.T. 5881.]

Even the original extortive demand made by Palermo in his telephone call to the Olympic Auditorium on October 23, 1958, was admitted by Palermo on the stand because of Gibson's admissions concerning his discussion at his Ambassador Hotel suite later that afternoon with Leonard, Nesseth, and Jackie McCoy. Palermo confessed, in the course of his testimony, that he had told Leonard that he was in for half of the fighter or there would be no fight. [39 R.T. 5795.]

The story, concocted by Palermo, Sica, and Dragna to explain their peculiar activities from the time Palermo arrived in Los Angeles on May 1, 1959, was destroyed by Palermo's admission that he had lied to Captain James Hamilton of the Los Angeles Police Department (after he was arrested on May 6, 1959, for petty larceny at the Los Angeles International Airport.) [41 R.T. 6095-6096.] During his interrogation by Captain Hamilton, *Palermo stated that he did not know Dragna and that he had not seen Sica in Los Angeles during that trip*, notwithstanding the fact that

he had been with Sica earlier that day at the Hollywood Legion Stadium in Leonard's office, and notwithstanding the fact that he had met Dragna at Puccini's Restaurant on May 1, 1959, and at Leonard's office at the Stadium on May 4, 1959. [38 R.T. 5615-5616.] Furthermore, Palermo and Sica both testified to meetings at the Beverly Hilton Hotel on May 2, 1959, and at Perino's Restaurant on May 5, 1959. Finally, Dragna and Sica testified to knowing Palermo for several years prior to May 1, 1959. [38 R.T. 5609-5610; 36 R.T. 5313.]

Gibson's cross-examination is very revealing of the extensive conspiracy to dominate the principal boxing titles, engineered primarily by Gibson and Carbo over the decade of the 1950's.

Gibson conceded that he made certain very damaging admissions to the United States Senate Committee on the Judiciary which were inconsistent with his direct testimony at trial. He made more damaging admissions during cross-examination concerning the operation of this conspiracy as it focused upon the welterweight title during the years 1958 and 1959.

During the first half of 1958, the welterweight title was vacant and an elimination contest was established to select a new title holder. Gibson reluctantly admitted a meeting with Carbo in Gibson's Roosevelt Hotel suite in New York City in early 1958. Gibson was aware that Virgil Akins' manager, Bernard Glickman, was Carbo-controlled. This was his admitted characterization of Glickman before the Kefauver Committee. He defined this to mean that Glickman consulted with Carbo on the matches he would make for his fighters.

In this meeting at the Roosevelt Hotel, according to Gibson, Carbo expressed interest in the planned elimination match between Akins and Logart. Gibson was also forced to admit, during cross-examination, that he had stated under oath to the Kefauver Committee that Carbo's participation in the making of the Logart-Akins match cost the I.B.C. an additional \$10,000 to \$15,000. [32 R.T. 4757-4759, 4773-4778.] Glickman also admitted such consultations with Carbo. [29 R.T. 4259, 4266-4268.] Further corroboration of Carbo's control of Glickman is evidenced by Glickman's admission, on cross-examination, that he delivered \$10,000 in currency to a courier sent by Carbo (once again, the perennial "Mike") as a "loan" to Carbo evidenced by no receipt. [29 R.T. 4270-4271.]

Thus, when Akins became welterweight champion, Carbo once again controlled that title. Gibson took credit for making Jordan the number one contender for the welterweight crown, testifying that he arranged it. [32 R.T. 4704.] This historical background explains the inevitability of Palermo's and Gibson's actions on October 23, 1958, and thereafter. If Jordan was to fight Carbo's man, Akins, for the title, Carbo required the guarantee of a secret interest in Jordan, as insurance against the possibility that the title would pass to Jordan. Gibson's admission of his discussion with Leonard and Nesseth on October 23, 1958, after the initial telephonic demand by Palermo, evidences his traditional role in the televised boxing industry as the economic enforcement arm of the Carbo-I.B.C. alliance. Leonard and Nesseth did not make up the story that the possibility of Carbo-inspired violence was discussed, and Gibson confirmed Nesseth's and

Leonard's testimony that he (Gibson) belittled the likelihood of violence saying that that sort of thing went out with "high button shoes." [33 R.T. 4843-4852; 34 R.T. 4971-4975; 14 R.T. 2061-2062.]

Carbo had a habit of joining telephone conversations to add his coercive influence. The January 27, 1959, and April 28, 1959, telephone threats from Carbo and Palermo, testified to by Leonard and corroborated by Nesseth, were not unique. Gibson was forced to admit that he considered the added presence of Carbo on a telephone call as "pressure" when he described a call to him initiated by Chris Dundee in early 1958 [Dundee testified for the defense and participated in the Chateau Resort Motel meeting with Carbo, Palermo, Genovese, and Leonard on January 6, 1959. 5 R.T. 641], when Dundee was seeking a favor from Gibson. [33 R.T. 4939-4945.] Gibson's Senate testimony, admitted by him on cross-examination, indicated that the tandem telephone call was a familiar Carbo technique.

The intimate business relationship between Carbo and Gibson in their illegal control of boxing is reflected by Carbo's concern over Leonard's testimony before the California State Athletic Commission on May 20, 1959. Gibson admitted receiving a telephone call from Carbo at his home sometime after May 20, 1959, in which Carbo inquired about Leonard's testimony and expressed surprise when Gibson informed him that, according to Leonard's testimony, Palermo had actually gone into Leonard's office at the Hollywood Legion Stadium. [33 R.T. 4932-4935.] Of course, the tape recorded conversation of May 6, 1959 [Exs. 96 and 97] demonstrates how far Palermo walked and talked

his way into Leonard's office at the Stadium with Sica's illicit assistance.

Dragna not only lied about the nature and purpose of his visit to Leonard's office on May 4, 1959, but he sought to convey the false impression that it was a coincidence that he met Palermo at Leonard's office. [38 R.T. 5677-5680.] On cross-examination, Palermo admitted that he had an appointment to meet Dragna at the Hollywood Legion Stadium on May 4, 1959. [40 R.T. 6036.]

Unindicted co-conspirator William Daly played his role in the conspiracy at two significant junctures. In the early fall of 1958, his aid was enlisted by Gibson to obtain covert control of the Hollywood Legion Stadium for the I.B.C., through his relationship with Edward Underwood. When Carbo's and Palermo's telephonic threats and Sica's and Dragna's ominous visits had failed to bring Leonard and Nesseth "into line", Gibson and Daly flew to Los Angeles together to apply more subtle pressures to Leonard. While Gibson was applying financial pressure to Leonard, Daly, acting out his traditional role of everybody's friend and nobody's enemy, attempted to convince Leonard that it was useless to fight the I.B.C.-Carbo combination. One of his brainwashing sessions with Leonard was recorded on May 14, 1959, at the Ambassador Hotel. Daly's remarks during this 2½ hour meeting reveal a very clever effort by Daly to convince Leonard of Carbo's ultimate power. In bloody detail, Daly described the beating of Ray Arcel in terms which indicate his contempt for Arcel's desire to operate a boxing promotion free of payoffs to Carbo. [Exs. 100-102, 176, 101-A for Ident. at pp. 32-34.]



Although Daly denied seeing or talking to Carbo for over a year, prior to May 1959 [21 R.T. 3101-3102; 22 R.T. 3245-3246], his recorded admissions to Leonard [Exs. 100-102, 176, 101-A for Ident.] coupled with a telephone toll slip [Ex. 30] conclusively establish that he spoke to Carbo (and probably Palermo) approximately seven hours before he boarded a commercial jet airplane with Gibson to fly to Los Angeles on May 11, 1959. [Exs. 156, 157, 158, 159.] Daly told Leonard on May 14, 1959, while referring to Carbo: "He's furious. I told him I wasn't coming out here 'til Wednesday, but he wanted me to meet him Sunday night. This is about quarter after one in the morning." [Exs. 100-102, 176, 101-A for Ident. at p. 24.] Exhibit 30 reflects that a station-to-station direct-distance-dialing call was made from Daly's residence in Englewood, New Jersey, at 1:42 a.m., May 11, 1959. This call lasted 10 minutes. The receiving number of this call, Hilltop 9-1585, was the telephone at the residence of Mrs. Margaret Dougherty in Upper Darby, Pennsylvania, which, Palermo admitted, was used by him. [39 R.T. 5850-5852.] Daly continued as follows:

"I wouldn't have got in—which I've often went out—ain't got no tails on you at that hour, but we used to meet around three or four in the morning and—which I didn't want to drive about 40 or 50 miles, and they have to drive 40 or 50 miles from where they were. I got out by saying I'm not going to do anything. But he found out, how the fuck he found out, he said, maybe from Jim Norris, I don't know. You know—

Leonard—Yeah, you came out with Truman.

Daly—Yeah, left about nine o'clock that morning. But Truman was all upset with the bout over the phone. Said, 'Get myself in this fucking jackpot. . . .'" [Exs. 100-102, 176, 101-A for Ident. at p. 24.]

Later, Daly told Leonard about calling Carbo and Palermo at Palermo's "Hilltop number back where they were," thereby connecting this conversation to the May 11 toll slip. [Exs. 100-102, 176, 101-A for Ident. at p. 46.]

Exhibit 167, a map of New Jersey and Pennsylvania, reflects that the approximate distance from Englewood, New Jersey, to Upper Darby, Pennsylvania is 100 miles. This corroborates the fact that Daly was talking about getting together with Carbo and Palermo on the night of May 11, 1959, by each driving half way from his house to the house of the other for a secret meeting. Of course, secrecy was necessitated, in part, by the fact that Carbo was then a fugitive from New York County, a fact which was concealed from the jury in the playing of Exhibits 102 and 176, by stipulation of the prosecution and defense.

Further evidence of the conspiratorial plan of Carbo and Palermo aimed at Leonard is the testimony of the New York detective, Frank Marrone, who discovered Carbo in New Jersey on the night of May 29, 1959, in a private residence. The only other person present when Marrone entered the house was Palermo's brother-in-law, Alfred Cori. In Cori's possession was a facsimile of the one thousand dollar Western Union money order [Ex. 59] sent by Palermo in the misspelled name

of "Daley" in December, 1958, so that Leonard could fly to Miami to be confronted by Carbo. [43 R.T. 6503-6504.]

Daly admitted, during cross-examination, that Gibson told him he was in trouble with Palermo and Carbo. [22 R.T. 3278-3279; 23 R.T. 3392-3399.] Daly admitted that he testified before the Grand Jury, in September, 1959, as follows:

"A. . . . And I told him he was a fool for even dealing with them in the beginning, he had no right to, I avoided them all my life. Jackie Leonard will tell you the exact words, 'You have no right to deal with them. Once you deal with them you are hooked.'

Q. That is exactly what you told him? A. Yes sir, I told him any number of times, Leonard." [23 R.T. 3379-3380.]

Particular attention should be paid to the telephone chart [Appendix A] since it collects documentary evidence, which in many cases is evidence collateral to the testimony of Leonard and Nesseth. It provides a chronological framework for the development of the conspiracy. - Special note should be paid to April 29, 1959, the day after the threatening calls from Carbo and Palermo. On that day Gibson received four calls from Palermo, and probably Carbo, and called the Hollywood Legion Stadium four times as well. [5 R.T. 683-684; 32 R.T. 4693; 43 R.T. 6520; Exs. 39, 23, 25, 24, 40, 44, 41 and 42.] The sequence of the calls, and the fact that several were to Gibson's home late at night is noteworthy. Late on the night of May 4, 1959 (on the same afternoon during which Palermo

and Dragna were intimidating Leonard at his office), Gibson telephoned Palermo under Palermo's alias, George Tobias, and spoke with him for 12½ minutes. [Ex. 34.]

The Court's attention is also respectfully directed to the schematic representation of the conspiracy, below. [Appendix B.]

(c) *Synopsis of Proof of Membership of Each Appellant in the Conspiracies Charged, Exclusive of Extra-Judicial Acts and Declarations of Co-conspirators.*

Appellants contend that appellee has not produced sufficient evidence to establish membership in the conspiracy, but that, if this has been accomplished, it has been done only by use of extra-judicial acts and declarations of co-conspirators against each other. Although the Statement of Facts, above, demonstrates that appellants' contention is without merit, we propose to summarize *some* of the evidence given against each appellant, *excluding* extra-judicial acts and declarations of any other conspirator.

(1) PAUL JOHN CARBO:

On January 6, 1959, Leonard was moved by Palermo from the Blue Mist Motel across the street to the Chateau Resort Motel, and while having breakfast in the coffee shop, Abe Sands ("Mike" or "Sandy") escorted Carbo into the coffee shop. [5 R.T. 637-639.] Carbo told Leonard that he had missed Norris (who Leonard had expected to see) and that he, Carbo, would handle it. Carbo took Leonard, Palermo, and Sands into the hotel room and made numerous demands re-

specting Leonard's ability to control Nesseseth and Nesseseth's fighter, Don Jordan (then welterweight champion). [5 R.T. 639-640.] Demands were made concerning a Jordan-Hart fight. [5 R.T. 640.] Palermo explained, in Carbo's presence, how they obtained control of Hart. Carbo stated that he wanted Palermo to get his percentage to keep him out of his (Carbo's) pocket. [5 R.T. 640.] Carbo repeatedly insisted that Leonard control Nesseseth and Jordan. [5 R.T. 642-646.] Carbo ordered Leonard not to leave the motel room, even to take a walk. [5 R.T. 642-643.] (John DeJohn had expected to see Norris in Miami that same month, and he was chauffeured along with Carmen Basilio, to a house where he was confronted, not by Norris, but by Carbo. The chauffeur was "Sandy". [44 R.T. 6574-6576; 20 R.T. 2833-2837.] )

On January 27, 1959, pursuant to instructions to call "Frank at the Palermo Hotel back east", Leonard telephoned one of the numbers provided to him by Palermo. [5 R.T. 651, 656; 13 R.T. 1796, Ex. 13.] After being reprimanded by Palermo for not sending 15 percent of Jordan's purse in the Jordan-Gutierrez fight, Carbo took the telephone and warned Leonard and Nesseseth that he had friends on the West Coast who would do his bidding if the money was not sent immediately. Leonard identified Carbo's voice. [5 R.T. 658-659.] (Although Leonard sent the check to "Clare Cori" on February 6, his fear was such that he dated it January 27, the date of the Carbo threat. [5 R.T. 663-665; Exs. 53, 54 and 55.] )

On April 28, 1959, Leonard received a telephone call from Carbo who said he was going to have Leonard killed; that he had controlled the welterweight title for



25 years; that he was going to have somebody in California take care of Leonard and Nesseth. Leonard identified Carbo's voice (Nesseth was with Leonard when he received the call and saw Leonard turn white and vomit). [5 R.T. 680-681; 13 R.T. 1819.] A few minutes after the Carbo call, Palermo telephoned. [Exs. 21 and 22 reflect the two calls were from the Cori home in Philadelphia.] John DeJohn saw Carbo and Palermo together in a Philadelphia residence in April or May of 1959. [44 R.T. 6574-6578.] Carbo was with Palermo's brother-in-law, Alfred Cori, in a private residence in New Jersey, a short distance from Philadelphia, on May 30, 1959, at which time Cori had in his possession a facsimile of a \$1,000 money order sent by Palermo to Leonard in the name of "William Daley." [43 R.T. 6498-6510, and see also 40 R.T. 6078-6079.]

Carbo received at least \$40,000 from an I.B.C. subsidiary, Nevill Advertising Agency, in the form of checks drawn to the order of Viola Masters, his wife (during the period 1954-1957). The payments were arranged by Gibson. [32 R.T. 4767-4773.] Carbo "held trial" for Leonard at the Palmer House in Chicago in March, 1958, in the presence of Al Weill, because Leonard was not giving preference to Weill fighters (evidence of common scheme and prior similar acts). [12 R.T. 1669-1673.]

In March, 1958, Carbo and Palermo were together in Washington, D. C. Carbo ordered Palermo to call the telephone number of Lou Viscusi in Houston, Texas. Viscusi was the manager of lightweight champion, Joe Brown. Carbo told Palermo to use the name of "Mr.

Frank.” (The same name used to set up the threatening call of January 27, 1959.) Palermo reported to Carbo that he, Palermo, demanded \$2,000, and that the recipient of the call, presumably Viscusi, was frightened. Carbo joined the telephone conversation (evidence of common scheme and plan). [15 R.T. 2258; 37 R.T. 5458-5461, 5481; 16 R.T. 2328-2331; 33 R.T. 4943-4946.]

In April 1958, Carbo congratulated Gibson upon his election as President of the I.B.C. [30 R.T. 4517.] After the State Athletic Commission hearing in May, 1959, Carbo questioned Gibson about Leonard’s testimony at the hearing, and told Gibson that Palermo had never entered Leonard’s office. [33 R.T. 4932-4935.] Carbo and Gibson had met in Gibson’s room at the Roosevelt Hotel in New York in January, 1958. One of the subjects discussed was Virgil Akins, soon to become welterweight champion. Akins’ manager, Bernard Glickman (called as a defense witness), admitted transmitting \$10,000 in currency to Carbo without a receipt. The money was delivered to him by “Mike” (Abe Sands or Sandy). [32 R.T. 4773-4778; 29 R.T. 4270-4271.]

## (2) FRANK “BLINKY” PALERMO:

On October 23, 1958, the morning after the Jordan-Ortega re-match, Gibson telephoned Palermo at the Bismarck Hotel in Chicago. [5 R.T. 592; 30 R.T. 4456-4461; Exs. 86-D, 86-C.] Shortly thereafter, while Gibson was with Leonard and Nesseth at the Olympic Auditorium, discussing the forthcoming championship fight between Jordan and Akins, Gibson received a telephone call from Palermo and then gave the telephone

to Leonard. [5 R.T. 599-600; 30 R.T. 4455-4456.] Palermo told Leonard that “we”, presumably he and Carbo, were in for one-half of the fighter, or there would not be any fight, and that Leonard should talk to Gibson about it and call him back at the Bismarck Hotel. [5. R.T. 601-604.] After meeting with Gibson, Leonard telephoned Palermo at the Bismarck Hotel in Chicago. Palermo told Leonard he would call him back from a pay phone. [12 R.T. 1762-1763; 14 R.T. 2062; 5 R.T. 605; Exs. 2, 3, 4, and 72; 4 R.T. 421-429.] Palermo wanted assurance that Leonard could handle Nesseth and Jordan, and that Gibson had said everything would be all right. Palermo again threatened that unless Leonard could control the situation, they (meaning Palermo and Carbo) were going to pull the fight, and that there would be no fight unless Nesseth gave up one-half of the fighter. [5 R.T. 605-607.] Between October 23 and December 5, 1958, Palermo called Leonard several times demanding assurance that Nesseth was under control. [5 R.T. 617.] Palermo told Gibson in Chicago, during this period, that he, Palermo, had a part of Jordan’s contract. [30 R.T. 4839-4844, 4846.]

Palermo induced Leonard to fly to Miami, Florida, ostensibly for the purpose of meeting with James D. Norris. [5 R.T. 622-623; 6 R.T. 846-847; 13 R.T. 1784-1785.] Shortly before Christmas, Palermo telephoned Leonard and told him that he had spoken to Daly (an unindicted co-conspirator) and that money would be sent to Leonard. [5 R.T. 623-624.] On December 23, 1958, Leonard received a \$1,000 Western Union money order purchased in Philadelphia. The purchaser was recorded as “William Daley”. [Ex. 82.]

Palermo again insisted on Leonard flying to Miami, telling him that he had \$1,000, and that he, Palermo, had sent the money order. [5 R.T. 625.] On January 5, 1959, Leonard flew to Miami where he was met by Palermo and Abe Sands ("Mike" or "Sandy"). Palermo took Leonard to the Blue Mist Motel where Palermo was registered as George Tobias, 1620 Wood Street, Carbondale, Pa. (false name and address). Palermo promised Leonard that early the next morning they would see Norris and "some people." [5 R.T. 630, 635, 637; 18 R.T. 2629; Ex. 50; 17 R.T. 2558-2564; Exs. 107-A, 107-B and 107-C.]

The following morning Palermo told Leonard that they were moving to a neighboring motel, the Chateau Resort Motel. Palermo registered as Lew Gross, 1620 Wood Street, Lehigh County, Pa. (false name and address). [5 R.T. 638-639; 17 R.T. 2567-2568; Exs. 109-A, 109-B, 108-A, 108-B.] At breakfast, Abe Sands ("Mike" or "Sandy") escorted Carbo into the coffee shop. Thereafter, Carbo made various statements and uttered various threats in Palermo's presence. (Set forth in detail above, under Carbo, and in the Statement of Facts.) After Leonard returned to Los Angeles, he received various telephone calls from Palermo and Carbo, checking on whether Leonard had Nesseth under control. [5 R.T. 647.]

Palermo had ordered Leonard to send 15 per cent of Jordan's purse (one-half the manager's share) to Palermo care of Clare Cori at an address in Philadelphia. Palermo admitted that Clare Cori was his wife. [5 R.T. 648-649; Ex. 52; 39 R.T. 5827.] (Note that Carbo had previously received payments in his wife's

maiden name, just as Palermo was doing on this occasion.) On January 27, 1959, after the Jordan-Gutierrez fight, Leonard received a message to call Frank at the Palermo hotel back east. Thereafter, he telephoned Palermo at one of the numbers provided for this purpose. [5 R.T. 656; 13 R.T. 1796; Ex. 13.] During this conversation, Palermo angrily told Leonard to stop stalling and send the money, and then gave the telephone to Carbo who proceeded to threaten Leonard in the manner set forth above. [5 R.T. 657-659.]

On February 6, 1959, Leonard mailed \$1,725.00 to "Clare Cori", as instructed by Palermo, at a Philadelphia address. This check was later cashed in Florida with the fictitious indorsement "Carmen Cosara" appearing thereon. The proceeds of the check were delivered to Palermo. [5 R.T. 663-665; Exs. 53, 54, 58, 110-A, 110-B, 110-C, 124; 21 R.T. 3011-3018, 3020-3024; 17 R.T. 2570-2572.] Palermo contended at the trial that the money represented repayment of a loan, but his income tax return for 1959 recorded it as income received from "Jackie Leonard for business promotion and services rendered." [40 R.T. 5969-5970; 44 R.T. 6307-6308, 6620-6626, 6629-6636, 6644-6645; Exs. 53, 170, 171, 172, and 174.] Palermo cursed Leonard for sending a check. [5 R.T. 670-671.]

Palermo wanted Leonard to be in St. Louis with Nesseth for the second Jordan-Akins title fight, and again pressed Leonard about a Jordan-Hart fight, saying that if Leonard and Nesseth did not go all the way with Carbo and Palermo, they would not get any help. [5 R.T. 672-676.] After the second Jordan-Akins fight Palermo and Glickman, Akins' manager, went to the promoter's office where Glickman asked about 15 per



cent of the purse, mentioning that Nesseth or Jordan owed some money. Palermo asked if Leonard had left some money. [18 R.T. 2601-2602.] Later that morning, Palermo asked Gibson to go to see Nesseth with him. [31 R.T. 4617-4618.] Palermo went to Nesseth's room at the Kingsway Hotel where Palermo demanded money from him. When Nesseth told him he was not going to pay off, Palermo said "'some mighty big people were going to be unhappy about it.'" Two witnesses, aside from Nesseth, testified that when Palermo left the room, he said "the man isn't going to like this." [13 R.T. 1809-1813; 15 R.T. 1225; 16 R.T. 2325.]

Thereafter, Palermo telephoned Leonard and threatened him because of Nesseth's failure to have the money [5 R.T. 676-677], and later that same day again telephoned Leonard threatening that he was going to get into a lot of trouble with people back East. [5 R.T. 678.] On April 28, 1959, Leonard received the telephone call from Carbo (referred to above in the section on Carbo) involving death threats. A few minutes after the Carbo call, Palermo telephoned Leonard, telling him that Carbo was right, that Leonard was a double-crosser, and that he, Palermo, "was going to see some people that were going to see" him. Nesseth was present. [5 R.T. 681-682; 13 R.T. 1827-1828.] (Telephone toll slips reflects the two calls; Palermo's call coming 4½ minutes after Carbo's. See Statement of Facts, above, and Exs. 21 and 22.) John De-John saw Carbo and Palermo together in Philadelphia in April or May of 1959. [44 R.T. 6576-6578.] On April 29, Palermo telephoned Gibson, collect. [Exs. 23, 32.] On April 30, Palermo checked into the Bismarck Hotel, charging his stay to I.B.C., care of Gibson.

[12 R.T. 1731-1732, 1739-1740; Exs. 70, 71.] Palermo frequently charged his stays at the Bismarck Hotel to Gibson's firm. [40 R.T. 6002.] Palermo met with Gibson and Sugar Hart's manager in the lobby of the Bismarck Hotel on May 1, and that same day, Palermo called Philadelphia (to the same telephone used by Carbo and Palermo on January 27 and April 28 to threaten Leonard and Nesseth). Palermo also telephoned the Hollywood Legion Stadium (where Leonard's office was located). [12 R.T. 1731-1732, 1739-1740; Exs. 70 and 71; 40 R.T. 6002; 31 R.T. 4641-4643; Exs. 74 and 76.]

On May 1, 1959, Palermo flew to Los Angeles without checking out of the Bismarck Hotel. The events transpiring thereafter are set forth in great detail in the Statement of Facts, as well as in other sections of this brief.

During the period May 1, 1959, through May 6, 1959, Palermo carried out Carbo's threat to use West Coast contacts. Palermo registered at the Beverly Hilton Hotel under the name of George Tobias on May 1. That evening he met with Dragna. On May 2 or 3, Palermo met with Sica and later that same day Palermo and Sica threatened Leonard. On May 4, Palermo and Dragna went to Leonard's office at the Hollywood Legion Stadium and had a conversation with Leonard, during which Leonard was warned about his conduct. Shortly after midnight, May 4, Palermo received a telephone call from Gibson under his alias, "George Tobias". On May 6, Sica and Palermo met with Leonard and Nesseth at the Hollywood Legion Stadium where Palermo, among other things, expressed concern

over the fact that the St. Louis Police knew about his visit with Nesseth after the Jordan-Akins fight in St. Louis. (See the Statement of Facts, above, for a detailed description of this meeting.)

On May 6, Palermo denied to the Los Angeles Police Department that he ever heard of Dragna, asserted that he had not seen any of the Sicas during that particular trip to Los Angeles, and said that he knew the Sicas only to say hello to. [42 R.T. 6212-6218.] On May 15, 1959, Palermo received \$9,000 from Gibson in Chicago. Although according to the books of Chicago Stadium Corporation, \$4,000 of this was intended for fighter Johnny Saxton, who was in a mental hospital, it was recorded, along with the remaining \$5,000 as ordinary income in Palermo's tax return. [35 R.T. 4949-4955; 34 R.T. 4999-5001; 40 R.T. 6080-6083; 44 R.T. 6620-6625, 6629-6634; Exs. 133, 170, 171, 172, 173 and 174.]

(3) TRUMAN K. GIBSON, Jr.:

On October 23, 1958, the morning after the Jordan-Ortega rematch and before leaving for the Olympic Auditorium, Gibson telephoned Leonard's home and then placed a call to Palermo at the Bismarck Hotel in Chicago. [5 R.T. 592; 30 R.T. 4456-4461; Exs. 86-C, 86-D.] Shortly after arriving at the Olympic Auditorium, Gibson received a telephone call from Palermo and handed the telephone to Leonard. [5 R.T. 599-600; 30 R.T. 4455-4456.] When Leonard told Gibson that Palermo had demanded a piece of Jordan's contract, Gibson replied that he should have mentioned this to Leonard earlier, but he had been too busy. (Corroborated by Palermo's remarks on May 6, when Paler-

mo, in the presence of Sica, asserted that Gibson had wanted to handle Leonard and Nesseth.) [5 R.T. 602; 12 R.T. 1756-1758.] Later that same day, Gibson met with Leonard, Nesseth and McCoy at the Ambassador Hotel. Gibson told his visitors that unless they went along with Palermo and Carbo, they would pull Akins (managed by Glickman) and cancel the fight. Gibson said, “[G]o along with it . . . it has been done before. That is the way the welterweight and lightweight titles have been run since Carbo and Blinky has gotten into the picture.” Gibson made it clear that “‘the only way that Jordan was going to get a title fight, was to go along with this thing, that Mr. Palermo had proposed, to cut the fighter in half.’” Finally, Gibson told Leonard to go to the telephone and call Palermo. [5 R.T. 603-604; 12 R.T. 1757-1760.]

Gibson said it was very important to him that Leonard and Nesseth submit to the Palermo-Carbo demands because he (Gibson) did not want either of them to interfere with the title fight (which was scheduled for national television on December 5, 1958). [32 R.T. 4780-4781.] Gibson repeatedly assured Leonard and Nesseth that he would take care of any money that was involved [5 R.T. 617-618; 12 R.T. 1760-1761; 30 R.T. 4473-4476], and that there would not be any violence. When Nesseth and Leonard told Gibson, before the December 5 title fight, that they were going to tell Palermo about Nesseth’s decision not to give up any part of his contract with Jordan, Gibson insisted that they should not make such a telephone call. [13 R.T. 1783.] Palermo telephoned Gibson in Chicago and advised Gibson that he had a part of Jordan’s contract. [33 R.T. 4851.]

Following are examples of Gibson's flagrant conduct revealing the true nature of his association with his co-conspirators and his consciousness of guilt with respect to this relationship:

(a) Payments to Carbo by the I.B.C. subsidiary Nevill Advertising Agency, under the name of "Viola Masters," because this looked better on their books than Carbo's name. [32 R.T. 4763-4773.]

(b) Gibson's false entry with respect to the payment of \$1,800 to Jack Leonard as "an advance" on the Porterville promotion when Gibson knew this was intended for Palermo. [5 R.T. 660-661.] Moreover, Gibson, inconsistent with his own entry, told Ogilvie, bookkeeper at the Legion Stadium, that the \$1,800 should be made payable to *cash* and was for "a friend." [33 R.T. 4894; 15 R.T. 2140-2141.]

(c) Two checks, totalling \$9,000, drawn to the order of "Frank Palermo" on May 15, 1959, nine days after Palermo's exploits in Los Angeles with Sica and Dragna. The bookkeeping entries in connection with these checks are palpably false and Gibson's explanations are incredible. (See the Statement of Facts, above, for a full explanation.)

(d) Gibson's letter to George Parnassus, dated October 28, 1958, in which Gibson sets forth the subordinate role of Leonard in the Hollywood Boxing and Wrestling Club. Gibson's statements in this letter are directly contrary to the impression Gibson had conveyed to the State Athletic Commission in order to obtain its approval of the new boxing club. [28 R.T. 4181-4183.]



The following is a partial list of admissions by Gibson given during his testimony at the trial:

(a) That it was the policy of the corporation of which he was the operating head (I.B.C.), to use the underworld to the extent that it could in the operation of its business. [34 R.T. 5050.]

(b) That the purpose in using the underworld was to prevent fixed fights, to put on fights that would please the sponsors and the public, to maintain a free flow of fighters without interference, without strikes, without sudden illnesses, without sudden postponements; that this was preventive action. [35 R.T. 5127, 5130-5136.]

(c) That when Gibson used the underworld to achieve his ends, he was not aware of the means that were being used on his behalf. [35 R.T. 5138.]

(d) That he had a telephone conversation with Palermo on April 29, 1959, the day before Palermo flew from Pennsylvania to Chicago, en route to Los Angeles, at the outset of the critical period of the conspiracy (May 1 to May 6, 1959). [31 R.T. 4640; Ex. 23.] (In fact he had three more calls from Palermo that day: Exs. 39, 25, 24.)

(e) That he and Palermo were working toward the same objective: a Hart-Jordan fight. [32 R.T. 4696-4697.]

(f) That he told Palermo to get out of Los Angeles during a person-to-person telephone call from Gibson to "George Tobias". [32 R.T. 4694-4697; Ex. 34.]

(g) That on May 3, 1959, during the course of a telephone conversation with Leonard and Nesseth, he

told the victims that he, Gibson, would save the Hollywood Boxing and Wrestling Club if Nesseth would agree to sign his fighter for a title fight with Sugar Hart; that this was the only alternative Leonard had to going out of business (the very same alternative was offered by Palermo and Sica at the Beverly Hilton Hotel on May 2 or 3, and on May 6 at the Hollywood Legion Stadium). Gibson said, among other things, "*now you got one chance, as I see it, and that is a Sugar Hart Championship fight. . . .*" [32 R.T. 4688-4689.]

(h) That he was neither concerned nor indignant when Palermo bragged to him of his (Palermo's) interest in Jordan's contract (in Chicago, in November, 1958 [33 R.T. 4851]), even though Leonard had expressed his fear of Palermo to Gibson on a previous occasion (October 23, 1958), and said he was afraid "something might happen to me." [33 R.T. 4849.] Nor was Gibson concerned in January, 1959 [33 R.T. 4889; 34 R.T. 4978-4979], or in May 1959, when Leonard complained of the threats. Gibson did not care and he told Leonard and Nesseth, on May 3, in the wake of Carbo's death threats, that they would get no sympathy from him. [32 R.T. 4684-4692.] Gibson's attitude is reflected in the following testimony given by him during the trial:

"Q. Well, what had Mr. Palermo done, so far as you knew, to earn a share or a part of Mr. Jordan's contract? A. I neither knew nor cared, Mr. Goldstein.

Q. You didn't care, did you? A. No, I did not." [33 R.T. 4851-4852.]

With respect to (h), above, it is interesting to note that Leonard's expression of fear to Gibson on January 27, 1959, was provoked when Gibson told Leonard that Palermo was trying to contact him (Leonard). Hours later, on the very same day, Leonard was threatened by both Palermo and Carbo during the January 27 telephone call referred to above. The May 2, 1959, plea to Gibson was within a week of Carbo's April 28, 1959, death threat over the telephone. The October 23, 1958, protest to Gibson was an aftermath of Palermo's demand for half of Jordan. Yet, Gibson, according to his own testimony, did nothing to obstruct or interfere with Palermo or Carbo, despite his acknowledged relationship with both. To the contrary, Gibson used his own, more subtle threats to coerce Leonard and Nesselth to submit to the Carbo-Palermo demands.

On or about May 5, 1959, Gibson telephoned Daly in New York and arranged to meet Daly in Los Angeles to handle the crisis at the Legion Stadium (note that this is at the very time Palermo was exerting pressure through use of Sica and Dragna). [32 R.T. 4662-4663.] Gibson flew from New York to Los Angeles with Daly on May 11, 1959, and both registered at the Ambassador Hotel. [Exs. 150-160, 166; 32 R.T. 4662-4663.]

Gibson had met with Carbo in his room at the Hotel Roosevelt in New York the year before, and one of the subjects discussed was Virgil Akins, about to become welterweight champion. [32 R.T. 4758.] When Gibson was elected President of the I.B.C., in April, 1958, Carbo telephoned his congratulations. [30 R.T. 4517.]

After the State Athletic Commission hearing on May 20, 1959, which exposed the conspiracy, Carbo telephoned Gibson to inquire about Leonard's testimony. [33 R.T. 4932-4935.]

(4) LOUIS TOM DRAGNA:

Dragna met with Palermo at Puccini's Restaurant on the evening of May 1, 1959, the day Palermo arrived in Los Angeles. [38 R.T. 5615-5616; 40 R.T. 6030-6037.] Dragna admitted that Palermo suggested that he, Dragna, contact Leonard. [38 R.T. 5618-5619.] Palermo told Dragna that the purpose of his coming to Los Angeles concerned Sugar Hart. Dragna told Palermo to telephone him on May 4, and provided Palermo with a telephone number. [38 R.T. 5666-5667.]

On May 4, 1959, Dragna entered Leonard's office with Palermo. Nesseth left the room when he saw Dragna. [6 R.T. 728.] Dragna listened to Palermo's diatribe about Leonard having double-crossed the appellants with respect to the control of Jordan. Palermo said, "He even had to tell the gray man he was going to get 15 percent" and Dragna added: "Well, you are wrong there, Jackie." Dragna told Leonard he was dealing with big people. Palermo told Leonard, in Dragna's presence, to get hold of Don Nesseth and straighten this thing out. It was explained to Leonard that the pressure would be removed if Nesseth agreed to have Jordan defend his title against Sugar Hart. Dragna asked Leonard if Nesseth did not live out his way, and Leonard, attempting to mislead Dragna, said that Nesseth lived near San Bernardino. Dragna, knowingly, said that Nesseth lived in West Covina. Then

Dragna pointedly inquired: “ ‘He has a wife and kids, doesn’t he?’ ” Palermo began screaming about Nesseth, and Dragna said: “ ‘You are right in the middle of this thing, Jack’ And he said: ‘You better try to get it straightened out or,’ he says, ‘you can be in a lot of trouble.’ ” [6 R.T. 728-732.] Dragna asserted, in the course of the session that “he was acquainted with these people.” (Referring to the Carbo group.) [12 R.T. 1700.]

(5) JOSEPH SICA:

On May 2 or 3, 1959, Sica, in response to a telephone call from Palermo (at Sica’s unlisted telephone: [36 R.T. 5377]) went to the Beverly Hilton Hotel. [36 R.T. 5316-5317.] According to Sica, Palermo asked him to contact Leonard and he (Sica) agreed to do this. [36 R.T. 5317-5318.] Sica testified that he telephoned Leonard. Leonard’s testimony was that the call was from Palermo. [6 R.T. 720; 36 R.T. 4984-4988; 40 R.T. 6030.] In any event, when Leonard arrived at the hotel, he found Sica *and* Palermo waiting for him. He was taken to Palermo’s room and threatened a number of times. He was told that he and Nesseth were in serious trouble and that he (Leonard) could get hurt. Sica offered to accompany Leonard to use force on Nesseth. [5 R.T. 686-692.] Sica also told Leonard that he (Leonard) had his head in a noose, and that the only way he could get out was to grab Nesseth and shake him and make him agree to the Hart fight. [6 R.T. 733.]

On the evening of May 4, Leonard received a call from Palermo and Sica, asking him to meet with Sica, Dragna, and George Raft to try to straighten out the



problem. [6 R.T. 736-737.] On the morning of May 6, when Leonard arrived at his office at the Hollywood Legion Stadium, Sica was waiting for him. Sica wanted to know if Leonard had contacted Nesseth and solved the problem. [6 R.T. 738-739.] Sica examined Leonard's office, the walls and ceiling thereof, as if looking for a concealed listening device. [6 R.T. 745-766; 13 R.T. 1848-1849; 17 R.T. 2457-2458.] Thereafter, Sica left and returned shortly with Palermo.

The conversation that ensued among Palermo, Sica, Nesseth, Leonard and McCoy, was recorded by the Los Angeles Police Department. It is fully described in the Statement of Facts, above. [Exs. 96, 97, 96-A for Ident.] During the meeting, Sica evidenced actual knowledge of the events which had transpired before his overt entry into the conspiracy. Sica told Leonard he was on the spot, and he castigated Leonard for double-crossing Carbo and Palermo. As Palermo and Sica left the meeting, Sica leaned over and whispered to Leonard, "'Jackie, you're it.'" [6 R.T. 745.] Nesseth observed Sica lean over and say something to Leonard, although he did not hear what it was. [13 R.T. 1849-1850.]

Sica's explanation at the trial for being in Leonard's office that morning was that he wanted to find out why Leonard had not shown up at Perino's Restaurant the night before. [37 R.T. 5495-5498.]

The jury rejected this. The following is Sica's testimony concerning his May 6 appearance at the Legion stadium:

"Q. What was your purpose in going by the Stadium the next day? A. Just to find out why he hadn't showed up at the appointment.

Q. What did you care? A. Usually when I make appointments with someone, Mr. Goldstein, I keep my appointments and a lot of times I wonder what happens to the other fellow that hasn't kept his appointment.

Q. You don't like it when people stand you up, is that it? A. I wouldn't say I don't like it. I don't particularly care for it.

Q. Is that why you went to the Legion the next morning? A. No, I wanted to find out what happened to Leonard, he hadn't shown up.

Q. You had your dinner, didn't you? A. Yes, I did, and enjoyed it too.

Q. What did you care what happened to him? A. Well, I just wanted to know why he hadn't shown up. He told me twice he would be there and he kept us hanging.

Q. Apparently he just didn't want to show up, wouldn't you say that? A. I don't know whether he didn't want to show up or not. I would say it was possibly because his wife hadn't got back in time, as he had said that morning.

Q. What possible difference would that make to you on the following day, Mr. Sica? A. I wouldn't know how to answer that." [37 R.T. 5498-5499.]

Shortly after Sica left the May 6 meeting, he had Willie Ginsberg telephone Manuel Dros, Leonard's assistant matchmaker. Dros was told to call Sica from a public telephone booth. When Dros reached Sica at the number provided to him by Ginsberg, he was told by Sica that he (Dros), was working for the wrong people (meaning Leonard). Sica said that he wanted

to contact Don Chargin (who was investing money in Leonard's failing business). Dros said he would try to locate Chargin. However, when Sica called Dros at his home later on for this information, Dros told him he could not find Chargin. [15 R.T. 2204-2206, 2210; 37 R.T. 5559-5564; 15 R.T. 2207.] On June 4, 1959, Chargin received an anonymous telephone call in Oakland. He was to leave the following day for Los Angeles and the caller warned Chargin that he knew his flight number and that he should stay out of Hollywood or he would get what Leonard got. (Leonard had been the recent victim of a beating.) [20 R.T. 2882; 43 R.T. 6358.]

Although Sica's testimony at the trial is too lengthy to repeat in this summary, a reading of it will reveal that he made numerous damaging admissions. An example of his testimony is set forth above. Among other things, Sica admitted that he told Leonard that he "was on the spot." [37 R.T. 5511.]

(d) *In General.*

The summaries of evidence against individual appellants and the Statement of Facts above show the *express knowledge* of all appellants with respect to the criminal nature of their participation in the conspiracy. There are also numerous facts and circumstances from which one can infer the requisite knowledge and intent:

"There is informed and interested cooperation, stimulation, instigation. . . . In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive

line which separates conspiracy from overlapping forms of criminal cooperation.”

*Direct Sales Co. v. United States*, 319 U. S. 703, 713 (1942).

It is interesting to note the extent of participation required by the Supreme Court in its analysis of the knowledge and intent questions. Direct Sales Co. was a drug manufacturer conducting a large mail order business which included the sale of morphine to a licensed physician in South Carolina. The volume of sales was such that Direct Sales Co. should have known the physician was dispensing the drugs illegally. “The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters’ inherent capacity for harm and from the very fact they are restricted, makes a difference in the *quantity of proof required to show knowledge. . .*” [Emphasis supplied.]

*Direct Sales Co. v. United States*, *supra*, at p. 711.

Since the illegal character of the transaction was inherent in the product itself, knowledge by Direct Sales Co. of the illegal activity by the physician was inferred. “While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist.” [*id.*, distinguishing *United States v. Falcone*, 311 U. S. 205 (1940).] (In the *Falcone* case harmless commodities were involved, and their sale to a bootlegger, even in quantity, could not

be said to imply knowledge by the seller of the lawful activity by the bootlegger in that case.)

The analogy to be drawn with the facts in the instant case seems apparent. All of the appellants, including Gibson, Sica, and Dragna, were dealing in an illegal commodity. They were applying pressure to Nesseth, through Leonard, in order to obtain Nesseth's property, with his consent, induced by the wrongful use of threatened force, violence and fear.

18 U. S. C. §1951.

All of the appellants were aware of one fundamental fact: *Nesseth did not want to give up any part of Jordan's contract to anyone. He did not want them as partners and the conspirators were trying to force themselves upon him.* As Nesseth testified:

"... [I]n the proper light, I was just a businessman that had a piece of property and nobody offered to buy it, they just wanted to take it away from me." [13 R.T. 1898.]

Naturally the appellants urge upon the Court the argument that there was no formal agreement among them with respect to Leonard and Nesseth and that, insofar as Sica and Dragna are concerned, they were victims of circumstance who were only trying to do a favor for Palermo. As the Supreme Court said in *Direct Sales Co., supra*, at page 714:

"Not the form or manner in which the understanding is made, but the fact of its existence and the further one of making it effective by overt conduct are the crucial matters. *The proof, by the very nature of the crime, must be circum-*



*stantial and therefore inferential to an extent varying with the conditions under which the crime may be committed.’’* [Emphasis supplied.]

Even if Sica and Dragna had stood silently by while Palermo did all the talking, the jury would be entitled to infer, under all the circumstances, that they had joined the conspiracy and were acting in furtherance thereof.

*Anderson v. United States*, 262 F. 2d 764, 711 (8 Cir. 1959).

In *United States v. Manton*, 107 F. 2d 834 (2 Cir. 1938), *cert. den.* 309 U. S. 664 (1940), the Second Circuit discussed the sufficiency of evidence against the defendant Manton. With two Associate Justices of the Supreme Court (Sutherland and Stone) sitting as Circuit Justices along with Circuit Judge Clark, the court observed that:

“It is true that Manton denied all incriminating testimony, and that, in the main, the evidence tending to show Manton’s partnership in the conspiracy came from the lips of convicted co-conspirators and other witnesses of bad or dubious character. Indeed, in a case like this, it is unlikely that it would be otherwise. But the credibility of these witnesses and the weight to be given their testimony, as we have already said, were questions for the jury and are matters beyond the scope of judicial review. Moreover, the record contains a mass of documentary evidence—accounts, cancelled checks, promissory notes, etc.—not only corroborative of the oral testimony, but adding independent strength to the government’s case.”

*United States v. Manton*, *supra*, at p. 843.

Consideration of this holding of the Second Circuit in *Manton* is helpful in analyzing the instant case. The court points out that there are a number of “significant” circumstances which bolstered the Government’s case. Seven of these are set forth in the opinion and each concerns evidence of an incriminating relationship among conspirators to be found in the instant case. It is not that they do things together (guilt by association) that persuades the court of their nefarious purpose; it is *what they do together*. The “long and friendly relations between Fallon and Manton”; gratuitous introductions; telephone conversations; suspicious financial transactions including loans made at Manton’s request—all of these, taken together with other evidence “disclose a state of affairs so plainly at variance with the claim of Manton’s innocence as to make the verdict of the jury unassailable. *The circumstances taken together amply sustain that conclusion.*” [Emphasis supplied.]

*United States v. Manton, supra*, at pp. 843-844.

In *Manton*, as in the case at bar, there were late comers to the conspiracy. The court dealt separately with one of these, appellant Spector:

“It is not required that each of the conspirators shall participate in, or have knowledge of, all the operations. He may join at any point in its progress and be held responsible for all that may or has been done.”

*Id.* at pp. 848-849.

The court found sufficient evidence to warrant a jury finding that Spector was a member of the conspiracy. The analogy between Spector’s conduct in *Manton* and

the conduct of Gibson, Sica, and Dragna in the instant case is irresistible. Spector acted as an “intermediary”; he made efforts to conceal the true character of certain financial transactions and altogether conducted himself in an unorthodox and devious fashion. The court held, with respect to Spector, that:

“Taken in connection with other evidence, it is hard to explain these devices upon any other theory than that they were adopted to conceal the real facts and to aid in the consummation of the criminal conspiracy. Certainly they are not the accompaniments of honest business. The circumstances of secrecy, intrigue and deviousness, and the attempts to conceal the real nature of the transactions, which the evidence discloses, are hallmarks of fraud and dishonesty, justifying the jury’s conclusion that a criminal conspiracy existed . . . and that Spector knowingly became a party to that conspiracy. . . . *In a case like this, it is enough that a convicted defendant knew he had connected himself with a criminal conspiracy, even though he was unaware of its full extent.*” [Emphasis supplied.]

*Id.* at pp. 848-849.

Whether or not any one or more of the appellants was aware of, or participated in, all aspects of the conspiracy is irrelevant.

“. . . ‘It is enough if a man, understanding that there is a crowd banded together to break the law, knowing in a general way what the purposes of the crowd are in that respect, becomes a member of it and acts with them to a greater or lesser extent. . . . *Where a conspiracy is established,*

*but slight evidence connecting a defendant therewith may still be substantial, and if so, sufficient.’”*

[Emphasis supplied.]

*McDonald v. United States*, 89 F. 2d 128, 138-139 (8 Cir. 1937).

Before concluding this section, a word should be said about appellant Gibson's role in the conspiracy. His was the more subtle part, one which he played with cunning. The record is clear that the wedding of Gibson's interests to those of Carbo was not thrust upon Gibson by Carbo. It was, above all else, a wedding of convenience, sought after as much by one party as the other. Gibson was not a victim of the underworld infiltration of boxing. He welcomed it. He nurtured it. He profited by it. That Gibson understood the sinister and criminal implications of his relationship with Carbo and Palermo is directly proven by the evidence which includes his eagerness to conceal payments to Carbo through the establishment of a fictitious employment relationship with Carbo's wife whereby he paid her under her maiden name. Who would know that Viola Masters was, in reality, Mrs. Frank Carbo? Although Gibson never personally threatened violence, he did threaten economic harm and his whole approach to the problem, as expressed to Leonard and Nesseth *and to the jury on the witness stand during the trial*, reveals amoral conduct of one nonchalantly unconcerned with means, so long as his ends, to wit, profits and monopoly power, were realized. [See the schematic representation of the conspiracy, below: Appendix B.]

“. . . That being true, a jury might have found that all the accused were embarked upon a ven-

ture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole.”

*United States v. Bruno*, 105 F. 2d 921, 922 (2 Cir. 1939), *rvsd.* on other grounds, 308 U. S. 287 (1939).

In conclusion, we are drawn inexorably to the case of *Krulewitch v. United States*, 336 U. S. 440 (1949), and particularly to the concurring opinion of Mr. Justice Jackson. Of course, *Krulewitch* was prosecuted upon a tenuous theory which invited the sentiments expressed by Mr. Justice Jackson. There is no analogy to be found in *Krulewitch*, in either fact or theory, to the instant case. Although the argument of appellants in the instant case, which is predicated upon *Krulewitch*, may have an emotional appeal, even this effect vanishes when the *holding* of *Krulewitch* is compared with the facts of this case.

For the instant case discloses all the evil inherent in a partnership in crime and, in itself, provides the rationale for treating conspiracy as a separate crime in the catalogue of criminal conduct. [See Mr. Justice Frankfurter’s statement concerning the extreme danger of a criminal conspiracy in *Callanan v. United States*, 364 U. S. 587, 593-594 (1961).]

In *Rex v. Meyrick & Ribuffi*, 21 Crim. App. Reports 94 (1929), the Lord Chief Justice of England, affirming a conspiracy conviction, wrote as follows:

“The attention of the Court has been directed to a well-known passage in which judicial remark



was made upon the unfairness that flows from the inclusion of a count for conspiracy in an indictment in which there ought to be no such count. The unfairness in such a case is, of course, manifest. *But the criticism has no relation at all to a case where the circumstances are such as to call for the inclusion of a count for conspiracy, and to call for it in the public interest for the due administration of justice.*”

4. Electronic Recordings Were Lawfully Received Into Evidence.

Three appellants object to the admission into evidence of certain electronic recordings which constituted unimpeachable corroboration of the testimony of the victims Leonard, Nesseth, and McCoy. These recordings fall into two categories. Palermo and Carbo urge that it was error to admit a telephone tape recording [Ex. 177] of a conversation between Palermo and Leonard, made by the Los Angeles Police Department with Leonard's permission. [Palermo's Op. Br. 5-6, 11-13; Carbo's Op. Br. 35-37, 63-64.] Carbo and Gibson contend that the recordings of a conversation between co-conspirator Daly and Leonard are inadmissible. [Exs. 100-102, 176, 101-A for Ident.; Carbo's Op. Br. 5, 14-16, 62-63; Gibson's Op. Br. 52.] These two recorded conversations will be treated separately.

(a) *The Palermo-Leonard Telephone Call—Exhibit 177.*

On the evening of May 5, 1959, Palermo telephoned Leonard at his home and attempted to persuade Leonard to come to Perino's Restaurant where Palermo and Sica were waiting for him. Palermo told Leonard

that he had been contacted by Carbo and that he and Leonard had to place a telephone call to Gibson. [Ex. 177.] The entire conversation was recorded by Leonard with the aid of a detective of the Los Angeles Police Department who attached an electrical induction coil to Leonard's telephone receiver in his home. The tape recording machine picked up the conversation from the telephone receiver via the induction coil. [44 R.T. 6708-6711.]

It ill behooves Palermo to contend, as he does, that the recording) and playing of this tape recording during the trial) was a violation of the Federal Communications Act. 49 U. S. C. §605. If it were a violation of that statute for one party to a conversation to record it on his own telephone without the knowledge of the other party to the conversation (who called him), Palermo and his trial counsel would be guilty of violating that statute. Their Exhibits C, D, and E are recordings of telephone conversations between Palermo and Leonard, made by Palermo without Leonard's knowledge or permission.

We submit, however, that it is not a violation of Section 605 to make a recording of a telephone call under such circumstances. There is no rational distinction, in terms of the policy of that statute, between a recording made via an induction coil attached to the receive, being used by a party to the conversation, and the testimony of a third person to what he heard via an extension telephone, with the sole permission of the party at his end of the wire. The latter circumstances have been held not to violate the statute in an extortion case brought under 18 U. S. C. §875(b).

*Rathbun v. United States*, 355 U. S. 107 (1957).

In *Rathbun*, the Supreme Court construed Section 605 in a sensible fashion and, we submit, resolved the question presented herein:

“ . . . The clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it. . . .”

*Rathbun v. United States, supra*, at p. 110.

However, the precise question raised here has been settled in the Fifth Circuit against the appellant, and the Supreme Court denied a writ of certiorari on the question earlier this year.

*Carnes v. United States*, 295 F. 2d 598 (5 Cir. 1962), *cert. den.* 369 U. S. 861 (April 23, 1962).

In *Carnes*, the Fifth Circuit carefully analyzed the entire history of cases under Section 605 in order to determine if an “interception” occurred within the meaning of the statute, when a party to the conversation used an induction coil to record the call without obtaining the permission of the other party:

“ . . . Taking a sensible view of it, the only difference between a person testifying to a conversation which he participated in or overheard and a recording of the conversation is that the recording has the advantage of furnishing trustworthy evi-

dence (assuming a showing that the tape has not been tampered with)."

*Carnes v. United States, supra*, at p. 602.

*Cf. State v. Carbone*, 31 L. W. 2029 (Supreme Ct. of N. J., Decided June 29, 1962, per Weintraub, C. J.);

*People v. Malotte*, 46 Cal. 2d 59, 292 P. 2d 517 (1956) (per Traynor, J.)

(b) *The Daly-Leonard Tape Recordings—Exhibits 100, 101, 102, and 176.*

Carbo and Gibson seek to invalidate the unimpeachable corroboration of Leonard's testimony concerning Daly's threats in behalf of Carbo and Gibson: the two independently recorded tapes of the session in Daly's room at the Ambassador Hotel in Los Angeles, May 14, 1959. [Exs. 100, 176.] Exhibit 100 is a wire recording made on a Minifon, a miniature recording device, concealed on Leonard's person. Exhibit 101 is a filtered copy of Exhibit 100 and Exhibit 102 is a filtered and edited copy thereof. Exhibit 176 is a tape recording of the same two hour conversation, recorded not by Leonard in Daly's room, however, but in a neighboring room by Sergeant Keeler of the Los Angeles Police Department through a radio receiver tuned to a miniature radio transmitter also concealed on Leonard's person.

Appellants contend that Exhibit 100 (as well as the exhibits copied from it: Exs. 101 and 102) was inadmissible because it was allegedly created in violation of the Fourth Amendment. They assert that Leonard obtained access to Daly's hotel room under false pre-

tenses, thereby violating *somebody's* right to be free from an unreasonable search, although it is unclear who that *somebody* is. Appellants are forced to concede in connection with their argument that the law of this Circuit is squarely against them.

*Todisco v. United States*, 298 F. 2d 208, 210 (9 Cir. 1961), *cert. den.* 368 U. S. 989 (1962).

However, by attempting to introduce the practice of psychoanalysis into the already complicated practice of the law, appellants urge this Court to overrule its decision before the first anniversary of its announcement, on the *authority* of their frustrated hopes about what the Supreme Court might have held—but did not—in the recent “spike mike” case.

*Silverman v. United States*, 365 U. S. 505, 508-510 (1961).

Despite appellants' theory about the changed philosophies of the Justices, the Supreme Court was presented with an opportunity to reject its prior holding in *On Lee v. United States*, 343 U. S. 747 (1951), and to adopt a right of privacy interpretation of the Fourth Amendment, in contradistinction to the traditional trespass to property theory. The Court faced the choice in *Silverman* and chose not to expand the Fourth Amendment into a federal right of privacy.

In addition to the *stare decisis* hurdle which appellants face, they are also confronted with another difficult question: whose constitutional rights are they asserting? Certainly not their own. The sole tenant of the hotel room was Daly. If any of the appellants had a joint interest in the premises—whether legal, equit-



able, or possessory—they failed to prove it below. Since they never had an interest therein, surely they are in no better position to suggest their standing to complain of Leonard's recording activities than Colonel Abel had standing to complain of the F.B.I.'s search of his espionage headquarters in Brooklyn. Though Abel had been checked out of his hotel room in federal custody, he had no standing to complain of the physical search and seizure in his residence. Appellants can hardly complain of a recording of Daly's threats to Leonard made by Leonard in a hotel room which they had never checked into.

*Abel v. United States*, 362 U. S. 217, 240-241 (1960);

*Eberhart v. United States*, 262 F. 2d 421, 422, fn. 1 (9 Cir. 1958).

Putting to one side the absence of standing of any appellant to urge this point, we submit that there is no point on the merits to urge. Even if *On Lee* goes as far as the Supreme Court is willing to go in sustaining surreptitious recordings by agents of the Government of face to face conversations with criminal conspirators, the scope of lawful recording is more than adequate to validate Exhibits 100, 101, and 102. Leonard was one of the victims of a vicious extortion plot. He did not ask Daly if he could come to talk with him. Daly threatened him with the wrath of Carbo and Gibson the previous day at the Legion Stadium, then *told* Leonard to come to his hotel room the following morning to continue the discussion. [6 R.T. 751-754.] Since Leonard was specifically ordered to see Daly in his hotel room, his right to be there (as an extortion vic-

tim) is certainly as clear as the right of a member of the general public to enter a laundry.

*Cf. On Lee v. United States, supra.*

Appellants are unwilling to identify Daly's purposes on May 14, 1959, with their own, but they are eager to identify his supposed constitutional rights with their own. However, no rights of Daly were infringed by Leonard, so there are no rights to which appellants can attach themselves with any profit.

Appellants are in even more troubled waters when they attempt to suppress the other recording of the same conversation made via the radio transmitter concealed upon Leonard's person. [Ex. 176.] This recording was offered by appellee during its rebuttal case for the sole purpose of proving *beyond a reasonable doubt* that Gibson's defense witness and co-conspirator, William Daly, was a perjurer. During Gibson's case, Daly attempted to discredit Leonard by clouding the authenticity of the Minifon wire recording [Ex. 100] made by Leonard. Daly testified that Leonard had omitted from the recording ten separate and distinct portions of their conversation of May 14, 1959. The suggestion of the defense was that Leonard had turned the Minifon's switch off whenever the conversation touched upon subjects embarrassing to Leonard. Clearly Daly never suspected that Leonard's clothing concealed a radio transmitter as well as a wire recorder that morning, or he would never have dared to take the witness stand and commit such cavalier and premeditated perjury. [23 R.T. 3285-3319.]

Thus, Exhibit 176 became a classic rebuttal exhibit, in that its sole function was to prove that a defense

witness had lied about a material matter; and it proved that fact to a moral certainty. The conversation contained upon it is identical with the conversation recorded on Exhibit 100, except for a gap of approximately 45 seconds when Sergeant Keeler turned the tape reel [Ex. 176] over. The switch on the radio transmitter was taped open so that Leonard could not conveniently shut it off in Daly's presence. Sergeant Keeler also monitored the entire conversation via the radio receiver while he was recording Exhibit 176. Leonard omitted *nothing* from Exhibit 100. [16 R.T. 2339-2341; 44 R.T. 6695-6703.]

Appellants make the specious contention that Exhibit 176 was inadmissible because Leonard operated the radio transmitter in violation of the Federal Communications Act. From this, they argue, the exhibit is tainted and should have been excluded. This argument is without merit for the following four reasons:

(1) Leonard was not the operator of the radio transmitter in any meaningful sense of the term. The transmitter was strapped to his body by the Los Angeles Police Department and the switch was taped in the "on" position. He never turned the switch off. Nor could he change the frequency of the transmitter, since it was *crystal-tuned* to the same frequency as the receiver in Sergeant Keeler's custody. [V C.T. 1324-1325.] Thus, Leonard was, at most, a mobile platform for the transmitter, not the operator of it.

(2) The transmitter was licensed by the Federal Communications Commission for use by the Los Angeles Police Department, which was the operator of the radio strapped to Leonard's body. [V C.T. 1324-1325.]

(3) Whether or not the transmitter was operated in violation of the station-licensing provisions of the Federal Communications Act, the recording made through the radio is not excludible from evidence. The purpose of the licensing features of the Federal Communications Act is to avoid “jamming” of the electromagnetic spectrum, not to guarantee rights of privacy to any person. Thus, violation of such provisions will not be punished by the federal courts through exclusion of evidence *transmitted* (not *intercepted*) in violation of the law.

*Todisco v. United States, supra*, at p. 211.

(4) Assuming such evidence were obtained in violation of the Federal Communications Act, further assuming that evidence so obtained violated the rights of Daly (the only non-consenting party to the conversation recorded), and finally assuming that such evidence would ordinarily be excluded for these reasons—still, Exhibit 176 would be received on the facts of this case. This is true because Exhibit 176 is evidence which exposes perjury by the witness whose supposed rights are violated. Although illegally obtained evidence might not be admissible on the Government’s case-in-chief, it becomes admissible to reveal a fraud upon the court when that fraud is perpetrated by the person who initially had standing to prevent the receipt of such exhibit into evidence.

*Walder v. United States*, 347 U. S. 62, 65 (1954).

5. Evidence That Leonard Relayed the Threats of the Conspirators to Other Victims of the Extortion Scheme Was Properly Admitted.

Carbo asserts that victims Nesseth and McCoy should not have been permitted to testify to the substance of threatening conversations between the conspirators and Leonard, relayed to them by Leonard. [Carbo's Op. Br. 17-19, 65.] The stated ground for the contention that it was error to receive this testimony is that it constituted *hearsay*. In each of the instances cited by Carbo in which Nesseth or McCoy testified to statements by Leonard, the declaration by Leonard was either a report of a threatening occurrence (either a meeting or telephone call) with one or more of the appellants, or a message intended by one or more of the appellants to be transmitted to Nesseth: either a threat or a demand for a meeting with him.

All of this testimony was properly received for several reasons:

(a) Leonard was used by the appellants as a conduit of threats intended by the appellants for Jordan's managers, Nesseth and McCoy. [See *e.g.* 13 R.T. 1823-1824, 1842.] For the purpose of these messages, Leonard was a talking agent of appellants. No hearsay danger is involved since the declarant (Leonard) testified to the original event (the call or meeting with the conspirators) and was subject to cross-examination thereon *before* Nesseth or McCoy corroborated Leonard's testimony that he had communicated the threats to them.

(b) Since fear in the minds of the victims is a necessary element in an extortion case, evidence circum-



stantially establishing this state of mind is competent, material, and relevant. It is settled law in prosecutions under the Hobbs Act that the courts must receive testimony of conversations among the extortion victims which tends to establish this element.

“ . . . Evidence of Wedaa’s conversation with Gilligan, a fellow company executive, was admissible for its bearing on the state of mind of the company officials who paid the money. . . .”

*United States v. Varlack*, 225 F. 2d 665, 673 (2 Cir. 1955).

See also:

*United States v. Kennedy*, 291 F. 2d 457 (2 Cir. 1961);

*Nick v. United States*, 122 F. 2d 660, 671-672 (8 Cir. 1941), *cert. den.* 314 U. S. 687, *reh. den.* 314 U. S. 715 (1941);

*United States v. Stirone*, 168 F. Supp. 490, 497 (W. D. Pa. 1957), affirmed 262 F. 2d 571 (3 Cir. 1959), *rvsd.* on other grounds, 361 U. S. 212 (1960).

(c) Finally, the testimony of Nesseth and McCoy was proper corroboration of Leonard’s testimony of threatening calls and meetings with appellants. Leonard was subjected to cross-examination by appellants for more than five days upon every aspect of his direct testimony, which had consumed approximately one and one-half days. [R.T., Volumes 5, 6, 8, 9, 10, 11, and 12.] A considerable portion of this cross-examination was aimed at discrediting Leonard’s testimony by questioning him about apparent inconsistencies between his

direct examination and his earlier statements to the Los Angeles Police Department [Ex. 64 for Ident.], the Federal Bureau of Investigation [Exs. 60 for Ident. —63 for Ident.], and the California State Athletic Commission [Ex. 65 for Ident.]. The theory implicit in appellants' cross-examination of Leonard was that he had recently fabricated his testimony in order to "frame" the five appellants by describing statements and acts attributed to them covering the period from October 23, 1958, to some time after the indictment in the fall of 1959, which statements and acts allegedly never occurred.

In this context, after Leonard had completed his testimony, Nesseth and McCoy were called to corroborate the essential framework of Leonard's story. In many instances, each of which Carbo now urges as error, Nesseth and McCoy recalled that Leonard had recounted the threatening events at or about the time Leonard testified (in court) that they had occurred in substantially the way Leonard related them to the court and jury. In each of the examples cited by Carbo in his seventh specification of error, Leonard's reports to Nesseth and McCoy were made while the conspiracy was still evolving and before Nesseth had made his first report to the Los Angeles Police Department.

Thus, Leonard's statements to Nesseth and McCoy were clearly admissible as prior consistent statements of a witness made prior to a time when he had a motive to fabricate. Such statements are received, after cross-examination of the declarant, as circumstantial corroboration of his courtroom testimony.

Judge Learned Hand recognized and applied this rule in a racketeering case many years ago:

“ . . . It is well settled that, when the veracity of a witness is subject to challenge because of a motive to fabricate, it is competent to put in evidence statements made by him consistent with what he says on the stand, made before the motive arose. The common sense of such a rule has been too strong for the formal objection that the evidence is hearsay, and indeed the objection is in substance not good anyway, since the witness is by hypothesis there to be cross examined. . . .”

*Di Carlo v. United States*, 6 F. 2d 364, 366 (2 Cir. 1925), *cert. den.* 268 U. S. 706 (1925).

*Cf. Lindsey v. United States*, 237 F. 2d 893, 895 (9 Cir. 1956).

Thus, for two distinct reasons, the declarations of Leonard to Nesseth and McCoy were *not* hearsay within the traditional meaning of that concept. They were properly received.

#### 6. Anonymous Telephone Threats to Leonard and Chargin.

Carbo and Sica complain that the district court erred in admitting testimony concerning certain anonymous threatening telephone calls received by Leonard and Chargin, after all five appellants had made direct threats to Leonard and Nesseth, and during the period of the conspiracy. [Carbo's Op. Br. 19-21; Sica's Op. Br. 37-38, 68-72.]

##### (a) *Anonymous Telephone Threats to Leonard.*

On direct examination Leonard was not asked to testify about any telephone calls in which he could not

identify the other party or parties to the call. On cross-examination, the defense sought to impeach Leonard by playing portions of Exhibit E, a tape recording made by Palermo of two telephone conversations with Leonard which transpired after the return of the indictment. Appellants used this recording to argue to the jury that Leonard was attempting to “frame” them with false testimony. [47 R.T. 7082-7084; 48 R.T. 7232-7233, 7274-7275, 7387.]

To meet this inference, appellee questioned Leonard on redirect examination to establish that the reason Leonard had finally agreed to accept money from the appellants, in order to be able to leave the country with his wife and child, was that he and his wife could not continue to live in fear for their lives. [12 R.T. 1659-1667.] After the extortion plot became public knowledge on May 20, 1959 (when the California State Athletic Commission held its precipitous public hearing), Leonard began to receive telephone calls which intensified his fear that reprisals would be taken against him for his testimony. Although these threats were brutal and related to Leonard’s testimony against the appellants [see the section concerning denial of bail during trial and the affidavits of Leonard and Jeanne Blakely filed in connection with the bail hearing during trial: III C.T. 533-537], appellee did not question Leonard about the contents of the calls in the jury’s presence.

It is clear that where the defense seeks to raise an inference that the Government’s witness is lying and that his testimony is a step in his attempt to extort money from the defendants, it is proper, on redirect examination, to establish the true facts concerning *the witness’ state of mind* (his motivation) when he ex-

pressed a willingness to accept money, previously offered to him by the defense, for his silence. [6 R.T. 765.] If it is proper cross-examination to attempt to show by *circumstantial* evidence that the witness had a criminal intent, as appellants sought to do here, it would be an odd rule of law that *direct* evidence of his lawful intent would be inadmissible on redirect examination.

However, the law is not so odd. The trial judge properly allowed the prosecution to rebut the false inference that the witness had concocted a plan to “frame” the appellants.

*Bracey v. United States*, 142 F. 2d 85, 89-90  
(D. C. Cir. 1944), *cert. den.* 322 U. S. 762.

(b) *Anonymous Telephone Threat to Chargin.*

During the months of April and May, 1959, while the appellants and their associates were threatening the lives of Leonard and Nesseth and simultaneously attempting (by financial pressure) to drive Leonard out of the boxing business, Leonard was negotiating with Don Chargin, the boxing promoter in Oakland, California, and Chargin's friend, Harvey Livingston, an automobile tire dealer from Hayward, California, to obtain capital with which to save the Hollywood Boxing and Wrestling Club from bankruptcy.

Immediately after Sica left Leonard's office on May 6, 1959, having whispered in Leonard's ear, “‘Jackie, you're it,’ ” Sica took steps to contact Leonard's assistant matchmaker, Manuel Dros, asked Dros how to contact Chargin, and warned Dros that he “was working for the wrong people.” [6 R.T. 745; 15 R.T. 2204-2206.]



On May 14, 1959, Daly explained to Leonard what had become obvious to him: that the appellants would bring every kind of pressure to bear upon him in order to force Nesseth "into line", including threats to the potential investors who might save the Club from extinction:

"Daly: What does he want to do with the joint? What have you done? Have you got a deal out there?

Leonard: I don't think we got a deal. I'll know today. Chargin was supposed to come in last night. He didn't come. He's not coming 'til today.

Daly: And he's—

Leonard: And now Joe Sica wants to see him. He's liable to screw the—it all up. I don't know.

Daly: Does Sica know Don?

Leonard: No. He read it in the paper yesterday or something. And right away he wanted to get a hold of Chargin to—

Daly: Does he know Livingston?

Leonard: No.

Daly: They'll find out who Livingston—

Leonard: Oh, yeah, they've checked him already. They've sent some cars up north, trying to find out where they can locate him and who he is. Try to put the—try to scare him away, you know.

Daly: *Oh, they'll get somebody up around San Francisco to go see him, and tell him to lay off you people. . . . [Unintelligible] You know. So it'll make the guy think a little bit, too, you know.*

Leonard: 25, 30, 40 thousand—a guy is going to stop and think you know.

Daly: *Yeah, and the guy's going to say, 'Look, we don't want your money to be hurt, but we'll fuck that club up every way we can.' All over a fucking nitwit like Don Nesseth. You can't talk to Nesseth? He won't listen?'* [Exs. 100-102, 176, 101-A for Ident. at pp. 49-50. Emphasis supplied.]

Chargin planned to come to Los Angeles on June 5, 1959. On June 4, while in Oakland, California, he received an anonymous telephone call:

“[T]he call stated to stay out of Hollywood and that they knew my flight number and, also, that ‘You saw what happened to Jack Leonard,’ and that was—then the party hung up.” [15 R.T. 2236-2237, 2239.]

Sica contends that the trial court should not have allowed Chargin to testify to this typical second installment in an extortion plot. He tacitly admits that he knew where Chargin could be reached in Oakland, but asserts that his prior contact with Chargin was completely legitimate. [Sica's Op. Br. 70-72.] This erroneously assumes that the jury believed Sica's testimony rather than the tape recording of co-conspirator Daly. It also assumes that the jury saw nothing incriminating in the surreptitious manner in which Sica contacted Dros in order to find out when Chargin was coming to Los Angeles, right after threatening Leonard for refusing the demands of Carbo and Palermo. Sica certainly fails to establish that the trial judge erred when he concluded that the circumstances of Sica's and Daly's prior threats to Leonard, in the

context of the over-all conspiratorial plan to destroy Leonard and Nesseth, justified admitting Chargin's testimony that he received exactly the type of threat that Daly warned Leonard would be forthcoming to Chargin. In an attempted extortion case in New York, the appellate court held:

"[I]t seems to me that it was a material fact to be proved that an explosion, which was just what the defendant had threatened, actually took place shortly afterwards and the result of which attempted to make effective the threat which was made. As a fact which would tend to throw light upon the intent of the defendant in making the threat it seems to me that this testimony was entirely competent. Whether it is called part of the *res gestae* or an independent fact which has probative force in proving that the defendant attempted to commit the crime of extortion on the afternoon of December ninth, it is not material to determine. My view of it is that it was a fact which in itself tended to prove that the defendant did make a threat on the afternoon of December ninth for the purpose of extorting money from the complainant and that the explosion followed as the natural result of the refusal of the complainant to comply with the defendant's demands.

"The principle upon which I consider this testimony admissible is stated by the learned author of Wigmore on Evidence (§105) as follows: 'Where one threatens to do an injury to another and that or a similar injury afterwards happens,

this furnishes ground to presume that he who threatened the fact was the perpetrator or instigator.' . . ."

*People v. Vitusky*, 155 App. Div. 139, 152-153, 140 N. Y. Supp. 24, 29 (1st Dept. 1913);

*Cf. People v. Dioguardi*, 8 N. Y. 2d 260, 168 N. E. 2d 683 (1960).

7. Evidence of Prior Similar Acts by Certain Appellants and Evidence to Show Carbo's Whereabouts During the Period of the Conspiracy Was Properly Admitted to Show Motive, Intent, and Scheme, and to Corroborate the Direct Evidence of Extortion.

Carbo presents a potpourri of items which he says should not have been received against him, claiming these items were irrelevant and prejudicial. [Carbo's Op. Br. 22, 77-78, fn. 9.] Only one of the occurrences which Carbo claims, in his argument, to be irrelevant is included in a specification of error. That is Leonard's testimony, on redirect examination, concerning a *command performance* which he endured at Carbo's direction on March 25, 1958, at a Chicago hotel. The entire transaction was injected into the case not by the prosecution, but by Carbo, who now complains because he finds he has been hoist with his own petard.

Counsel for Carbo opened the matter up by asking Leonard about a session at the Palmer House in Chicago in March, 1958, in which Carbo, Ralph Gambina, and Al Weill participated. He suggested to Leonard that Leonard made an offer to Carbo to give Carbo half of all his fighters if Carbo would allow the lightweight champion, Joe Brown, to fight an un-

identified opponent. Leonard denied that he had made such an unlikely offer, pointing out that he was a matchmaker at the time and did not manage a single fighter. [10 R.T. 1456-1457.] Carbo never offered any evidence which even tended to contradict this denial. Then, Carbo waived cross-examination of Gambina when Gambina admitted his presence at such a meeting. Gambina had been called as a witness by Sica. [16 R.T. 2390-2394, line 1; 2406.]

Since Carbo had generated some heat but shed no light upon the matter on Leonard's cross-examination, the prosecution properly asked Leonard, on redirect examination, what the true contents of the conversation were.

When Leonard was asked to relate the conversation, Carbo's counsel objected:

“[I]t is incompetent irrelevant and immaterial, and it calls for a conclusion of the witness.”  
[12 R.T. 1671-1672.]

None of these grounds is good. Carbo has abandoned all but *irrelevancy* in his Opening Brief. If the conversation was irrelevant to prove any issue in the case, it was improper cross-examination of the same witness by counsel for Carbo; however, Carbo does not admit such error. Leonard's answer to the question was no doubt *prejudicial* to Carbo in the sense that Judge Learned Hand used the term in the *Compagna* case when he justified the reception of certain evidence which “prejudiced” the defendant Kaufman.

*United States v. Compagna*, 146 F. 2d 524, 530 (2 Cir. 1944), *cert. den.* 324 U. S. 867, *reh. den.* 325 U. S. 892 (1945).



The substance of the testimony was that James Norris told Leonard that Carbo wanted to see him. Leonard asked Gibson where he could locate Carbo. Gibson replied that he did not know where Carbo was staying in Chicago, but assured Leonard that he would receive a telephone call informing him where to go. The call came. It was from Al Weill who picked Leonard up and took him to a room at another hotel where they met Gambina and Carbo. [12 R.T. 1669-1671a.]

Carbo put Leonard "on trial", as it were, for failing to match a sufficient number of Weill's fighters at the Hollywood Legion Stadium. Carbo stated that "he had made a lot of money with Weill," and that Weill was working in conjunction with Gambina. Thus, Leonard's *orders* were to use both Weill's and Gambina's fighters more frequently:

"I told him that if they fit I would use them and otherwise I didn't want to use them. And he said, 'Whether they fit or not, I have made a lot of money with Weill and you better use those fighters.'" [12 R.T. 1672-1673.]

Carbo was shouting at Leonard in the course of his lecture. [12 R.T. 1673.]

It is difficult to understand how such an incident, first opened up by Carbo, could be irrelevant, when it tends to prove that Carbo had made extortive demands upon Leonard, seven months before he had Palermo make the unlawful demand upon Leonard on October 23, 1958, which was calculated to maintain his control of the welterweight title. The incident certainly illuminates Carbo's intent when he subsequently threatened Leonard's life and livelihood at the clandestine meet-

ing in Miami and in his telephonic threats to Leonard one year later. The common theme is Carbo's attempt to force Leonard to aid him in maintaining his illicit dominion over boxing.

*Bush v. United States*, 267 F. 2d 483, 489 (9 Cir. 1959);

*Schino v. United States*, 209 F. 2d 67, 74 (9 Cir. 1954), *cert. den.* 347 U. S. 937 (1954).

This evidence performs a function in this case which is even more pertinent than evidence of prior similar acts, which evidence is admissible standing alone. The March, 1958 incident is additional evidence that appellants Gibson and Carbo had confederated on occasions prior to the time that Jordan became the top welterweight contender, when Carbo desired to apply pressure to Leonard. Note that it was Gibson and Norris who acted as Carbo's messengers to invite Leonard to Carbo's "trial" at the Palmer House. As Judge Learned Hand held in the trial of the principal Communist Party conspirators:

"... There can be no logical reason for limiting evidence to prove that the defendants were in a conspiracy between 1945 and 1948 to the period of the charge; if they were in the conspiracy earlier, declarations of any one of them or of any other person acting in concert with them are as competent as those made within the period laid. Whether they are relevant depends upon how far they form a rational support for believing that the conspiracy continued to 1945; but it is nonsense to say that events occurring before a crime, can have no relevance to the conclusion

that the crime was committed; and declarations are no different from any other evidence. How far back of the commission of the crime one may go is a matter within the general control of the judge over the relevancy of evidence. . . .”

*United States v. Dennis*, 183 F. 2d 201, 231 (2 Cir. 1950), affirmed 341 U. S. 494 (1951).

The rest of the shotgun blast contained in Carbo's tenth argument [Carbo's Op. Br. 77-78, fn. 9] under the label of irrelevancies is not even covered by a specification of error. However, they will be quickly answered.

Carmen Basilio's testimony was offered to establish two facts pertinent to the case. It demonstrated that Carbo was in Miami during January, 1959, thus corroborating Leonard's testimony that he saw Carbo with Palermo in the Chateau Resort Motel in Miami on January 6, 1959. The second function of Basilio's testimony was to show a similar act, evidence of Carbo's *modus operandi*, in arranging meetings so that the other party would not know that he was about to be confronted by Carbo. Basilio and his manager, John DeJohn, received a telephone call to come to James Norris' house. They were picked up by a chauffeur who they thought had the name "Sandy." (Leonard was picked up at the Miami airport by Palermo and a man whose true name was Abe Sands. Sands also brought Carbo to the motel.) When Basilio and DeJohn arrived at their destination, just like Leonard, they were greeted by Carbo rather than Norris. [44 R.T. 6574-6576; 20 R.T. 2833-2837; 5 R.T. 624, 630, 635; 18 R.T. 2629; Ex. 50.]

The question of Carbo's secret monopoly of the welterweight title, no matter who temporarily wore the crown, was central to the motivation and scheme of the conspiracy charged in the indictment. The reason Carbo and his co-conspirators threatened Leonard and Nesseth was because Carbo saw Nesseth questioning his claim to manage secretly whomever was the champion. Therefore, evidence that Carbo had exercised *de facto*, though not *de jure*, managerial control over the welterweight champion who was ousted from the championship by Don Jordan, was excellent circumstantial evidence of Carbo's ability and motive to tell Leonard, quite authoritatively, through Palermo that "‘We are in for half the fighter or there won't be any fight.’" [5 R.T. 601-602.] Evidence that Akins' manager of record, Bernard Glickman, saw fit to discuss Akins with Carbo during 1957 and early 1958 (when Akins became champion) was evidence of such *de facto* control. [29 R.T. 4259-4260.] Glickman's \$10,000 "loan" to Carbo, in the form of currency, without any evidence of indebtedness to protect him, was additional circumstantial corroboration of Carbo's control of Glickman. [29 R.T. 4270-4271.] More corroboration of Leonard was supplied by the testimony of Glickman that the \$10,000 in currency was picked up from him by a Carbo messenger who identified himself as "Mike." Abe Sands was also identified to Leonard as "Mike" when he met Leonard at the Miami airport. [5 R.T. 630.]

The rebuttal testimony of New York Police Department Detective Frank Marrone proved two material facts. First, it established that Carbo was in the Philadelphia vicinity a month after his April 28, 1959,

telephone threats to Leonard from the Cori residence in Philadelphia. (John DeJohn provided further corroboration of this fact when he testified that he saw Carbo and Palermo together in an unidentified private house in Philadelphia in April or May, 1959 [44 R.T. 6574-6578].) Second, it provided circumstantial corroboration of the fact that Carbo's and Palermo's plan to extort money from Jordan's managers initially included an attempt to win Leonard's confidence by sending him a \$1,000 Western Union money order which enabled him to come to the Miami meeting. A facsimile of this money order, which had been sent by Palermo to Leonard before Christmas, 1958, in Daly's name (misspelled), was found by Marrone in the possession of Palermo's brother-in-law, Alfred Cori. Cori was discovered with this document alone in the house with Carbo after midnight, ten days after Leonard had testified about the extortion plot at the public hearing. Cori's incredible explanation, made in Carbo's presence, for being at this private home in New Jersey, after midnight, was that he had come to do the gardening! [43 R.T. 6498-6510.]

Detective Anthony Bernhard's experiences at Goldie Ahern's Restaurant in Washington, D. C., on the night of March 19, 1958, was another excellent example of evidence of common scheme and plan as well as additional evidence of Carbo's control of Akins' manager, Glickman. A third function of this proof was its circumstantial corroboration of the fact that Palermo and Sica were knowing co-conspirators with Carbo, as well as another employee of the I.B.C., Billy Brown.

Bernhard overheard Carbo and Palermo discuss a telephone call which Carbo had Palermo make to a



telephone number in Houston, Texas, assigned to Lou Viscusi, manager of the then lightweight champion, Joe Brown. Carbo had Palermo demand "two grand right away" in this call. Seated at the table during the discussion of this unlawful demand was Billy Brown who was the I.B.C.'s matchmaker at Madison Square Garden. [43 R.T. 6511-6521; 14 R.T. 1971; 15 R.T. 2258.] The significance for this case to be found in the fact that Carbo controlled the manager of the lightweight champion, just as he controlled the manager of the welterweight champion in 1958, is that Sica told Harvey Livingston, manager of top contending lightweight Johnny Gonsalves, that he would try to arrange a title fight between Gonsalves and Brown. The price would be \$1,000 expense money and the understanding that Livingston would give up fifteen per cent of the fighter to an unidentified person located in Miami (where Leonard saw Carbo apparently residing in an apartment [5 R.T. 645-646].) Since Brown's manager lived in Houston, Texas, and Sica said the arrangements for such a fight had to be made in Miami, and since the price of a chance to fight for the title was the same fifteen per cent that was demanded by Carbo and Palermo from Jordan's purses [5 R.T. 665], it seems clear that Sica was acting as Carbo's shake-down emissary *in loco Palermo*. [16 R.T. 2331.]

Bernhard also overheard discussion between Carbo and Palermo about a dinner for "Jim" which he wanted to attend. The reference probably was to a dinner involving James Norris of the I.B.C. Carbo told Palermo that he would be able to attend it. Three days later, Detective Bernhard observed Palermo outside the Walnut Room of the Bismarck Hotel in Chicago where

a Ring Dinner was being held. [43 R.T. 6524-6526.] On the dais were Gibson, Norris, Carmen Basilio, and Bernard Glickman. [44 R.T. 6546-6548, 6550-6551.]

Finally, Bernhard overheard Carbo tell Palermo and the others at the table:

“ . . . ‘I have troubles—I got this trouble straightened out. Now I got more trouble. I got his contract. He is my fighter. I spoke to Glickman about it so don’t worry.’ ” [43 R.T. 6525.]

This remark by Carbo was made two days before Akins fought Logart in an elimination bout leading up to the selection of a new welterweight champion to assume the vacant title. [13 R.T. 1937.] It is also interesting to note that when Akins defeated Logart in that fight, he then faced another Carbo-controlled fighter in the final elimination bout for the title: Vince Martinez, who was managed by co-conspirator Daly. [13 R.T. 1937; 21 R.T. 3064.] Thus, the relevance of the conversations in Goldie Ahern’s Restaurant was much too clear for Carbo’s comfort.

The last item listed in footnote nine by Carbo is the evidence showing that Leonard was in Tijuana, Mexico in the company of an officer of the Los Angeles Police Department on May 11, 1959. [43 R.T. 6448-6457.] The reason for offering this evidence in rebuttal was to negate a suggestion made by Daly, during his testimony for Gibson, to the effect that Leonard was wasting his time playing in Tijuana when he should have been working to save the Club. [23 R.T. 3332-3336.] The rebuttal testimony established that Leonard was in Tijuana that day on business.

8. The Declarations of Co-Conspirator Daly Were in Furtherance of the Objects of the Conspiracy and Were Properly Received by the District Court.

Appellants found Daly to be a useful agent of their criminal conspiracy until the indictment was returned. Now they disavow his loyal services in their behalf and urge that evidence of the pressure and intimidation which he exerted upon the victims was not admissible against them. [Carbo's Op. Br. 5-17, 58-62.]

(a) *Prior Consistent Statements.*

Carbo's first contention is that the tape recordings [Exs. 100-102, 176] of Leonard's meeting with Daly on May 14, 1959, at the Ambassador Hotel are inadmissible, because they contain prior consistent statements by Leonard. This claim is frivolous. They were received for Daly's remarks thereon, not for Leonard's. Daly was not a prosecution witness. It is the highly probative effect of Daly's statements in these recordings to which Carbo objects, not Leonard's, since Leonard did not have a co-conspirator's knowledge of the contemporary activities of Carbo, Gibson, and Palermo in the East.

However, the recordings of the May 14th conversation were admissible to corroborate Leonard's testimony of the recorded conversation, even if they were evidence of prior consistent statements by him. [6 R.T. 751-754.] They were offered after the cross-examination of Leonard, during which appellants attempted to suggest recent fabrication by the witness.

*Di Carlo v. United States*, 6 F. 2d 364, 366 (2 Cir. 1925), *cert. den.* 268 U. S. 706 (1925).

(b) *Daly Was Shown to Be a Co-conspirator, as Alleged in the Indictment, and a Talking Agent of the Appellants.*

On two successive days in May 1959, Daly, who is named as an unindicted co-conspirator in the indictment, had extended conversations with Jack Leonard. On May 13, 1959, Daly went to the Hollywood Legion Stadium where he insisted on talking to Leonard, not in Leonard's office, but in the empty auditorium. [6 R.T. 751-752.] In this conversation, Daly warned Leonard that he was "in a hell of a jam". Daly said that he did not know what he could do for Leonard:

" . . . He said, 'You have got the whole East upset.' He said, 'Everybody is blaming everybody else. Norris is upset, Gibson is upset, and Carbo is upset and Palermo is upset.' He said, 'you have just got the whole dam [sic] works upset.' " [6 R.T. 752.]

Then Daly discussed Leonard's and Nesseth's difficulties with Carbo and Palermo, concluding:

" . . . '[N]ow you are in a hell of a mess.' And he said, 'I just don't know how I can straighten this thing out.' He said, 'I doubt if I can.' He said, 'Carbo is really boiling.' He said, 'When I left back there I talked to him a couple of nights before,' and he said, 'he is real upset about this situation out on the Coast.' " [6 R.T. 753-754.]

Daly's parting remarks demonstrate his role as the joint representative of Carbo and Gibson, because his statement relates the two forces of the extortion con-

spiracy: Carbo and the I.B.C. Daly asked Leonard to try to get Nesseth to agree to talk with him (Daly):

“He said, ‘I would like to straighten the thing out.’ He said if he could straighten Nesseth out, that maybe he then could go back to Carbo or Norris and get the money to put the Club back on its feet. And with that he said, ‘See me in the morning. . . .’” [6 R.T. 754.]

Appellants did not object to this entire conversation wherein Daly admitted his conspiratorial role as a diplomat for extortionists. The conversation indicated that Leonard was to see Daly the following day. Appellants seek to suppress evidence of the events which transpired the following day in Daly’s room at the Ambassador Hotel. They contend that Daly was not shown to be a conspirator so that his declarations during the period of the conspiracy, which were calculated to further the objects of the conspiracy, could be received against all appellants.

We submit that abundant evidence of Daly’s status as a co-conspirator appears in the record justifying consideration by the jury against the appellants of the May 14 session.

Once Leonard had been induced by Gibson and Palermo to accept their demand to give up “half of the fighter” on October 23, 1958, Carbo and Palermo realized that Leonard had to be brought under tighter supervision and control by a face-to-face indoctrination session. This was the purpose of the Miami meeting on January 6, 1959. The problem facing the Carbo group was to lure Leonard there without arousing his fears. Palermo’s job was to convince Leonard



that he could meet with James D. Norris in Florida and obtain Norris' support in his efforts to book more nationally televised bouts of leading fighters for the Hollywood Legion Stadium. [5 R.T. 622-623.] Leonard was short of funds during this period of time, a fact which he communicated to Daly, during a call from Daly about December 15 or 16, 1958. Daly's sudden interest in Leonard is not surprising, since Jordan had just won the welterweight title ten days earlier. He told Leonard that "he would get hold of some people and see what he could do" about Leonard's financial difficulties. [5 R.T. 623-624.] Palermo continued his calls urging Leonard to come to Miami to see Norris. [5 R.T. 624.]

On December 23, 1958, Palermo called again and told Leonard that he had spoken with Daly and the money was being sent to Leonard. That same afternoon, Leonard was notified by Western Union that a \$1,000 money order had been sent to him by Daly. [5 R.T. 624; Ex. 59.] The next day Palermo called once again, insisting that Leonard come to Miami; Palermo said that everybody was going to be in Miami and that he wanted Leonard to be there as well:

" . . . He said I could tell Norris just what Mr. Gibson was doing and what Mr. Parnassus was doing out here, and that I could get all the help I wanted as long as I could assure the right people back there I could control the welterweight champion." [5 R.T. 624.]

During the following week, Palermo's demands for Leonard to go to Miami became more persistent. Leonard continued to avoid the issue, telling him he could

not get an airline reservation during the holiday season. Palermo called Leonard back and told him that TWA had space available on January 4 and 5, 1959. Leonard still tried to parry Palermo with the reply that he did not have much money. Palermo replied:

“. . . ‘Don’t tell me that.’ He said, ‘You have got a thousand dollars.’

“I said, ‘How do you know about the thousand dollars?’

“He said, ‘Well, I sent it.’ ” [5 R.T. 625.]

Palermo appears to have been telling the truth about this. The application for the \$1,000 money order was filed with Western Union in Philadelphia, where Palermo lived, not in Englewood, New Jersey, where Daly resided. Although the application was intended to attribute the transmittal of funds to Daly, Palermo misspelled Daly’s name on the application: D-a-l-e-y. [Cf. Ex. 82 with 6 R.T. 748-749 and 24 R.T. 3441-3442.] Thus, Daly and Palermo cooperatively endeavored to lure Leonard to the Miami meeting where Carbo, not Norris, could confront Leonard and convince him of the futility of attempting to challenge his control of the championships. [5 R.T. 639-646.]

When Jordan had successfully defended his title in April, 1959, and Nesseth and Leonard had failed to pay Palermo and Carbo any portion of that purse, the terror tactics commenced in earnest. Carbo’s and Palermo’s telephone threats were followed by Palermo’s trip to Los Angeles and his visits to Leonard with his local reinforcements, Sica and Dragna. This direct pressure did not obtain the objective: Leonard’s and Nesseth’s surrender to Carbo. However, Leonard’s and

Nesseth's telephone call to Gibson on May 3, 1959, requesting him to get Palermo out of Los Angeles, coupled with Palermo's difficulties with the Los Angeles Police Department as he was leaving Los Angeles, on the night of May 6, 1959, necessitated employment of another of Carbo's regular emissaries in an attempt to finish the job on Leonard and Nesseth. This was Daly's task.

After Leonard's and Nesseth's demand to Gibson on May 3 that he "call off the dogs", Gibson telephoned Palermo at the Beverly Hilton Hotel on the following night, using Palermo's alias, *George Tobias*. [13 R.T. 1830; Exs. 34, 84-A, 85-A.] Either that day or the following day, Gibson called Daly and arranged for Daly and himself to fly to Los Angeles. [32 R.T. 4662; 23 R.T. 3404.]

About eight hours before meeting Gibson at New York International Airport on May 11, Daly telephoned Carbo and Palermo at the Cori house in Philadelphia, at 1:42 A.M., May 11, 1959. [Exs. 156-160, 166; 43 R.T. 6323-6330; Exs. 100-102, 176, 101-A for Ident. at pp. 24, 46-47.] Apparently, Daly was obtaining his last minute orders from one of his two masters.

Daly's expenses for his stay at the Ambassador Hotel in Los Angeles from May 11 until May 22, 1959, were paid by Gibson's company. [Exs. 91-A, 91-B, 91-C; 22 R.T. 3150-3151.] When Gibson learned that Leonard was not in Los Angeles, he left Daly there to deal with Leonard on Leonard's return, and flew back to Chicago the same day. [32 R.T. 4664, 4669; Exs. 90-A, 90-B.]

During that week, when Daly was not with Leonard, he found time to meet with appellant Sica. [22 R.T. 3140.] Also present at this meeting were two other persons who had had questionable dealings in the past with Carbo: George Parnassus and Edward Underwood. [5 R.T. 641-642; 26 R.T. 3723-3724, line 11; 3727, line 19-3728; 3733, lines 10-12.]

In addition to the foregoing evidence of Daly's conspiratorial role, two factors of the most persuasive quality should be considered in evaluating the proof that Daly was a co-conspirator. The contents of Daly's remarks on May 13 and May 14 provide circumstantial evidence of his complicity with appellants, since he reveals knowledge of the activities of the conspirators in these two conversations, activities with respect to Leonard, which could not have been known to him unless one or more of the conspirators had taken him into their confidence during the course of the conspiracy. Circumstantial evidence, aside from Daly's statements, reveals that the conspirators who had taken him into their confidence prior to May 13 were Carbo, Palermo, and Gibson.

Thus, if Daly were not a member of the conspiracy charged, how did he become so conversant with the facts of the relationship among Gibson, Palermo, and Carbo, in connection with the demand for control of Jordan? [See Exs. 100-102, 176, 101-A for Ident. at pp. 10, 21, 24, 30, 44-45.] Daly testified that he had not spoken with Palermo or Carbo on the telephone for one and one-half years prior to May 13, 1959. [21 R.T. 3099-3102.] If that were true, he failed to explain why he told Leonard on May 14, 1959, that

Palermo called him at home and asked him to contact Jerry Geisler to help him (Palermo) with his petty larceny case in Los Angeles. [Exs. 100-102, 176, 101-A for Ident. at pp. 46-47.] Palermo had been arrested on that charge only one week earlier as he was leaving Los Angeles by plane for the East. [41 R.T. 6120-6122, 6126, 6118.]

The second convincing fact that establishes Daly's status as a co-conspirator, aside from all that has been set forth above, is Gibson's use of Daly at the trial. Gibson called him as a defense witness after the prosecution's evidence of Daly's activities of May 13 and May 14, 1959, had been admitted into evidence. Gibson chose to question Daly about certain aspects of the tape-recorded session of May 14, but studiously avoided mention of all the portions thereof which incriminated himself or any of the other appellants. Having Daly available as a witness, indeed having used him on a direct examination which consumed 74 pages of the Reporter's Transcript [21 R.T. 3061-3114; 22 R.T. 3121-3141], Gibson elected not to have Daly deny having made the statements which incriminated all the appellants, nor to have Daly explain his remarks in a manner which would eliminate their probative significance as evidence of appellants' guilt. Failing to have Daly deny these incriminating declarations or explain them away, after having called him as a defense witness, Gibson must suffer the unfavorable inference that Daly's testimony on these matters would have been un-



favorable to him by tending to establish Gibson's membership in the conspiracy with Daly and the other appellants, a fact which Daly made clear to Leonard on May 13 and 14, 1959.

*Samish v. United States*, 223 F. 2d 358, 365 (9 Cir. 1955), *cert. den.* 350 U. S. 848, *reh. den.* 350 U. S. 897 (1955);

*United States v. Fox*, 97 F. 2d 913, 915 (2 Cir. 1938);

*Cf. Caminetti v. United States*, 242 U. S. 470, 492-495 (1917).

Furthermore, if Daly were not a member of the conspiracy charged in the indictment, why did he repeatedly perjure himself, both on direct and cross-examination, in an effort to establish that Leonard had omitted certain portions of the conversation when he made the Minifon wire recording? [Exs. 100-102, 101-A for Ident.] There is no doubt whatsoever that Daly did perjure himself. He listed ten topics of conversation which he had had with Leonard on the morning of May 14 in his hotel room, none of which is to be found on those recordings. [22 R.T. 3125-3135; 23 R.T. 3285-3300; Exs. 100-102, 101-A for Ident.] Daly, and presumably the five appellants, did not realize that two independent recordings had been made of the May 14 conversation. Nor did they realize that Sergeant Keeler of the Los Angeles Police Department was listening to the conversation as he recorded Exhibit 176 through a radio receiver tuned to

a radio transmitter concealed upon Leonard's person. Exhibit 176 and Sgt. Keeler's testimony established Daly's perjury to a mathematical certainty. [44 R.T. 6697-6703.] Daly perjured himself at other places in his testimony, if we assume that his prior inconsistent sworn testimony before the Grand Jury in September, 1959, was truthful. [22 R.T. 3260-3279.]

Appellants do not question the fact that Daly was an agent of at least one of their number. [32 R.T. 4662-4670; 21 R.T. 3092-3097.] Gibson used Daly as an emissary in Los Angeles not only in May, 1959, but at the time he was secretly taking over the Legion Stadium in the fall of 1958, using Leonard as a figure-head to satisfy the California State Athletic Commission. [29 R.T. 4322; 23 R.T. 3307-3308; 27 R.T. 3974.] Daly was to have a secret 20 per cent interest in the Hollywood Boxing and Wrestling Club under Gibson's plan. [28 R.T. 4181-4183; 21 R.T. 3083-3084; 28 R.T. 4139-4140; 29 R.T. 4327-4328; 25 R.T. 3694-3695; 21 R.T. 3080-3082; 28 R.T. 4181-4183; 29 R.T. 4321-4322.]

Once Daly's agency was established, his declarations in furtherance of the criminal conspiracy were admissible. The criminal purpose of the declarations can be established by the declarations themselves:

“ . . . In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and

defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves.”

*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 249 (1917).

Accord:

*Fuentes v. United States*, 283 F. 2d 537, 539-540 (9 Cir. 1960).

(c) *Daly's Declarations Were in Furtherance of the Conspiracy.*

The element of criminality is clearly established in Daly's declarations to Leonard on May 13 and May 14. Carbo contends that declarations of a co-conspirator must be in furtherance of the conspiracy in order to be admissible against the co-conspirators and that Daly's were not. We submit that Carbo is in error in both contentions. First, the declarations need not be in furtherance of the conspiracy so long as they are made by a co-conspirator during the period of the conspiracy. Second, these declarations were unquestionably intended to execute the conspiracy. The Supreme Court held sixty-six years ago:

“ . . . The declarations must be made in furtherance of the common object, or must constitute a part of the *res gestae* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the Horsa had been proven, then, on the question whether such combination was lawful or not, the motive

and intention, *declarations of those engaged in it explanatory of acts done in furtherance of its object came within the general rule and were competent. . . .* [Emphasis supplied.]

*Wiborg v. United States*, 163 U. S. 632, 657-658 (1896).

The facts set forth in the Supreme Court's opinion in *Wiborg* indicate that the declarations were not made in furtherance of the conspiracy; however, what was said by the persons aboard the *Horsa* explained the purpose of its voyage, which was the fact in issue. A district court opinion in the *Cellophane Case* follows *Wiborg* and squarely holds that the declarations of a co-conspirator need not have been made for the purpose of furthering the objects of the conspiracy in order to be admissible against the other co-conspirators:

“. . . I think it sufficient for purposes of admissibility if the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy or is explanatory of acts done in furtherance of the objects of the conspiracy. . . . Thus, a statement by a co-conspirator to a third party concerning some act done in furtherance of the conspiracy is admissible although the actual making of the statement in no way furthered the conspiracy. . . .”

*United States v. E. I. du Pont De Nemours & Co.*, 107 F. Supp. 324, 325 (D. Del. 1952), affirmed on the merits 351 U. S. 377 (1956).

The three cases cited by Carbo for the proposition that the declarations must be made in furtherance of the conspiracy are not authority for the issue pre-

sented herein. In each case cited, the statement was *obiter dictum* since the facts presented declarations made *after the termination of the conspiracy*.

*Delli Paoli v. United States*, 352 U. S. 232, 237 (1957);

*Fiswick v. United States*, 329 U. S. 211, 217 (1946);

*Logan v. United States*, 144 U. S. 263, 308-309 (1892).

In any event, the contents of Daly's statements to Leonard are a series of subtle extortion threats. As a "front man" for Carbo and Gibson, Daly used the modern *soft sell* technique. His testimony during the trial, and his statements to Leonard in the recordings, indicate that Daly played the role of *everybody's friend* in the boxing business, a duplicitous role which the conspirators would utilize when other measures proved inappropriate or ineffective. The thrust of what Daly said to Leonard in his casual manner on May 14 is a very pointed reminder to Leonard of what he should have learned during his years in boxing: that Carbo and Gibson controlled all money-making facets of professional boxing and that force had been used by the conspirators in the past to overcome obstacles *e.g.*, Leonard and Nesselth, and would be used, if necessary, in this case. Many portions of the May 14 conversation which support this analysis are summarized or set forth at length in the Statement of Facts, above. Daly's description of how Ray Arcel was beaten nearly to death when Arcel tried to leave the Carbo fold is a ghoulish illustration of Daly's technique of intimidation. While commiserating with Leonard about his



perilous position, Daly described Leonard's danger in a fine Italian hand:

"See what they do. They use a water pipe, see. You know, regular lead water pipe. Lead pipe. And about that short. About that thick. And they just get an ordinary piece of newspaper, see, newspaper don't show fingerprints. Then they take it and they wrap it just in the newspaper, see —" etc. [Exs. 100-102, 176, 101-A for Ident. at pp. 32-34.]

Daly expressed the opinion to Leonard that Arcel "just got stupid," he had no right to stop paying off to Carbo after all those years. [*Id.* at p. 33.] The parallel to Leonard's situation, the message which Daly intended to convey to Leonard, is obvious. Threats may be communicated as well by parable as with a gun. The total impact of this two and one-half hour session is that Daly, as Carbo's and Gibson's representative, was informing Leonard that if Daly could not assure Carbo of Nesseth's immediate capitulation to Carbo's demands for control of Jordan, Leonard and Nesseth would suffer Ray Arcel's fate, or worse. [See Exs. 100-102, 176, 101-A for Ident. at pp. 13, 14-16, 18-23, 30, 32-35, 44, 49-50, 52-53, 56-57.]

The May 14, 1959, threats, to which appellants have objected, as well as the May 13 threats of Daly, to which appellants failed to object, were as competent against the five appellants as the Carbo and Palermo telephone threats of April 28, 1959. Both episodes played the same role in the execution of the conspiracy, the further terrorization of the victims, Leonard and

Nesseth. Both were overt acts of the conspiracy charged in Count One. [1 C.T. 4-5.] The May 14 conversation was properly received.

**9. Impeachment of Sica on His Misdemeanor Conviction.**

Sica took the witness stand in his own defense. At the conclusion of his direct examination, Sica's counsel attempted to minimize Sica's felony conviction record by purporting to cover it in four brief questions before cross-examination could begin. [36 R.T. 5357.] Sica lied in his response, admitting only two of his felony convictions.

On cross-examination, the prosecutor's first questions were aimed at exposing Sica's concealment of his true record of convictions. At first, Sica denied his third felony conviction which he suffered in the State of New Jersey for the crime of robbery. [36 R.T. 5359.] However, after he and his counsel were shown copies of his two felony convictions from New Jersey [36 R.T. 5360-5361; Ex. 134 for Ident., Ex. 136 for Ident.], he reluctantly admitted his third felony conviction. [36 R.T. 5362-5363; 37 R.T. 5516.]

Having concealed one felony conviction and admitted two others, Sica was then asked by the prosecutor:

“And in 1951 were you convicted of a conspiracy to violate certain sections of the Penal Code of the State of California? . . . Specifically, subsections 1, 2, 3, 4, 5, and 6 of Section 337(a) of the Penal Code.” [36 R.T. 5363-5364.]

Counsel for Sica objected to the question and suggested another bench conference, during which he represented to the Court that this fourth conviction of

Sica for conspiracy, although a felony, resulted in a misdemeanor type sentence rendering it, under California law, a misdemeanor conviction. In reply to the representation, the prosecutor read from an exemplified copy of that judgment [Ex. 135 for Ident.], as follows:

“Conspiracy to violate subdivisions 1, 2, 3, 4, 5, 6 of Section 337(a), Penal Code, *a felony*, as charged in the Information, and defendant having admitted prior convictions as alleged in the Information.” [36 R.T. 5364-5365. Emphasis supplied.]

The court then read the copy of the judgment and tentatively concluded that it constituted a misdemeanor conviction, although denominated a felony on its face, because the sentence was one year. [36 R.T. 5365.] The prosecutor replied that the exemplified copy of the judgment stated on its face that the conviction was for “a felony” and urged further that the conviction was a proper basis for impeachment, even if California law made it a misdemeanor conviction, because the conviction was for *conspiracy* which is a crime involving moral turpitude. [36 R.T. 5366-5367.] At this point Sica’s counsel moved to strike the question and asked the court to instruct the jury to disregard it. Judge Tolin asked counsel if he would like the jury to be instructed as to the nature of Section 337 of the California Penal Code, indicating what it is and that it had misdemeanor status. At this point, the jury had not heard if Sica had been convicted of this offense or what it was. Sica’s counsel expressly requested such an instruction. [36 R.T. 5367.] Before

the instruction was given, Sica's counsel volunteered that he believed the prosecutor had asked the question in good faith. [36 R.T. 5367-5368.] The court agreed with this suggestion, pointing out:

“Counsel can readily be misled by the fact that the judgment on its face refers to the offense as being a felony. Courts are often misled, and I might say the law is in some state of confusion.” [36 R.T. 5368.]

Judge Tolin then turned away from the bench conference and instructed the jury at length on the law of witness impeachment, stressing that the conviction most recently asked about was for a misdemeanor and therefore could not be considered by them at all in evaluating the credibility of this witness. [36 R.T. 5368-5371.]

After the court had finished its admonition to the jury on this point, it requested Sica's counsel's opinion and he indicated to the court his satisfaction with the instruction. [36 R.T. 5372.]

That was the end of the matter until the following day when Sica's counsel reversed his field and accused Government counsel of asking about this conspiracy conviction in bad faith, knowing it to be a misdemeanor. For the first time he made a motion for mistrial on this ground. [36 R.T. 5408-5410.] Denying this motion, Judge Tolin found that the question was asked in good faith and pointed up the legal confusion connected with the problem of impeaching witnesses who have suffered convictions under California law. [36 R.T. 5410-5411.]

Once again in this Court, Sica's counsel alleges without foundation, and contrary to Judge Tolin's finding, that the prosecutor asked about this conviction when "he knew the conviction was a misdemeanor, not a felony." [Sica's Op. Br. 52-57.]

The fallacy of this specification of error by Sica is that he fails to establish his underlying legal assertions: (1) that the question was improper and if so, (2) that prejudicial error was committed in asking it. He has cited no federal authority in his Opening Brief supporting the proposition that a witness in a federal criminal case may be impeached only by proof of convictions for crimes defined as *felonies* in the convicting forum.

California statutes and decisions which are cited by Sica define the line between felony and misdemeanor convictions in California courts. However, in a federal criminal prosecution, federal common law determines which convictions may be used to impeach a witness's credibility.

Rule 26 F. R. Crim. P.

The federal rule is that a witness may be impeached by establishing that he has been convicted of a felony or convicted of a misdemeanor amounting to a *crimen falsi*.

*United States v. Montgomery*, 126 F. 2d 151, 154-155 (3 Cir. 1942), *cert. den.* 316 U. S. 681.

The *Montgomery* case indicates that a *crimen falsi* is an offense the conviction for which logically sheds doubt upon the credibility of the offender, now tes-



tifying as a witness. A conspiracy to violate the laws of a State, especially the laws prohibiting such organized criminal activity as bookmaking, would appear to be an offense which sheds considerable doubt upon the witness' credibility—certainly as much doubt as a conviction for the offense of depositing a revolver in the mail [18 U. S. C. §1715], a felony.

The Supreme Court has recently restated the socially dangerous and sinister characteristics of a criminal conspiracy which justifies independent punishment for its commission, separate and apart from the commission of the substantive offense. Mr. Justice Frankfurter, referring to a conspiracy to commit a racketeering offense, said for the Court:

“. . . For example, in *Clune v. United States*, 159 U. S. 590, the Court upheld a two-year sentence for conspiracy over the objection that the crime which was the object of the unlawful agreement could only be punished by a \$100 fine. . . .

“This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a

conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.”

*Callanan v. United States*, 364 U. S. 587, 593-594 (1961).

We submit that the question about Sica’s criminal conviction was a proper impeaching question. In any event, the question was asked in good faith after Sica had concealed his true felony conviction record. No prejudice resulted on any reasonable view of the matter since the court cautioned the jury to disregard the question entirely, and none of Sica’s felony convictions were alluded to by the prosecutor during his argument to the jury, although Sica’s counsel repeated the incorrect statement that Sica had suffered only *two* felony convictions, in his argument to the jury. [48 R.T. 7206.]

Rule 52(a), F. R. Crim. P.;

*Kotteakos v. United States*, 328 U. S. 750, 764-765 (1946);

*Cf. Carlton v. United States*, 198 F. 2d 795, 799 (9 Cir. 1952), (prosecutor’s good faith belief);

*Bohol v. United States*, 227 F. 2d 330 (9 Cir. 1956), (no conviction at all).

Certainly, the jury was not prejudiced in this case by the asking of this question after it had learned that Sica's criminal record included three prior felony convictions, among them a conviction for a crime of violence. [36 R.T. 5363; Ex. 134 for Ident. (robbery).]

10. Proof of Bias and Corruption of Sica's Witness, Tom Stanley, Was Properly Admitted.

Understandably chagrined about his own decision to call Tom Stanley (true name: Salvatore Casarona) as a witness to discredit Jack Leonard, Sica urges this Court to find that it was error to allow the prosecution to show Stanley's criminal complicity with and bias for Sica. [Sica's Op. Br. 40-41, 72-85.] Stanley was for many years a boxing manager and promoter who frequented the Hollywood Legion Stadium during Leonard's tenure. After the Club went into bankruptcy, Stanley periodically visited Leonard at the Gossett-Ames Ford agency where Leonard worked, in order to collect installments on a debt which Leonard owed to him. [20 R.T. 2852, 2854, 2863-2864.]

The gist of Stanley's direct testimony for Sica was an attempt to show that Leonard had asked Stanley to contact Sica, with whom Stanley was acquainted, in order to hasten the payment from appellants to Leonard of \$20,000 so that Leonard could leave the country. [20 R.T. 2864-2865.] The second barb to Stanley's dart was the story that Leonard had telephoned him a few days before the trial began in order to suggest that Stanley avoid service of a subpoena in this case. [20 R.T. 2066-2067.]

Cross-examination began a revelation of quite a different picture of Stanley's activities from the minute Sica walked out of Leonard's office on May 6, 1959, until the trial began. Stanley's cross-examination should be read in its entirety to fully appreciate the Judas role he played for Sica. [20 R.T. 2868-2938, 2943-2949, 2952-2958, 2963-2966.] Stanley repeatedly contradicted himself about the extent and nature of his relationship with Sica. He admitted a casual acquaintance with him for five years, at first, but denied ever having telephoned Sica. [20 R.T. 2868-2869.] Later, he slipped, admitting he had spoken with Sica four or five times on the telephone. [20 R.T. 2910.] He explained that he obtained Sica's telephone number from the telephone directory. [20 R.T. 2913.] Later, apparently realizing that he had fallen into a self-made trap (Sica's telephone number was not published in the telephone directory [Exs. 161, 163]), he changed his story and said that he had learned Sica's number from Norman Sugarman. Mr. Sugarman happened to be the attorney for both Sica and Stanley. [20 R.T. 2866, 2948-2949.]

Stanley denied having made statements to California State Athletic Commission investigators in the Spring of 1960 which were diametrically opposed to his direct testimony. [20 R.T. 2869-2899.] However, on rebuttal, Ray Bascom, a special investigator for the Commission, testified that he had called Stanley to the Commission's Los Angeles office on May 1, 1960, to question him about two telephone calls made to him by Sica. Stanley explained to Bascom in 1960 that Leonard had told him he was afraid

Sica might hurt him “*and told him that he knew Stanley was a friend of Sica and he wanted Stanley to contact Sica and take the pressure off.*” Bascom took Stanley to the office of the United States Attorney where Stanley repeated these facts which were in complete contradiction to Stanley’s testimony one year later in court. [44 R.T. 6669-6670. Emphasis supplied.]

As the trial neared, Stanley tried to lay a foundation for changing his testimony by contacting Bascom and telling him he had lied the previous year about the calls from Sica; that the real explanation was that Leonard had asked him to obtain \$15,000 from Sica or Palermo in exchange for Leonard’s departure from the United States. [44 R.T. 6670-6671.] Apparently Stanley had not learned his script thoroughly when he reported the *true story* to Bascom in 1961, since his testimony on direct examination raised the price to \$20,000. [20 R.T. 2864.] In the hall outside the courtroom, Stanley made a second *amendment* to his story so that Bascom would not be too surprised by Stanley’s testimony on the witness stand. [44 R.T. 6672.]

The impeachment of Stanley was completed by Leonard’s testimony on rebuttal in which he exposed Stanley’s repeated attempts to corrupt him, first by urging him to exculpate all of the appellants, later by acting as a go-between for Sica and the other appellants in connection with a proposition to pay Leonard to leave



the country, and finally by suggesting that Sica would pay Leonard to testify in order to exculpate Sica, but not the other appellants. [43 R.T. 6349, 6356-6363, 6367, 6371, 6373, 6376-6381, 6386, 6388, 6390-6396, 6398; Ex. 122-A.]<sup>13</sup>

Stanley's self-contradictions on cross-examination, and Bascom's and Leonard's independent impeachment of him conclusively established to the jury, whose finding of fact on credibility is conclusive, that Stanley's direct testimony was a fabrication and that he was guilty of bias and attempted corruption. The Supreme Court of Oregon has held:

"Moreover, we think it was further competent, as tending to disclose . . . McClain's corrupt intentions, and hence his untrustworthiness, in relation to the very case on trial . . . McClain, having pleaded guilty prior to the time when the impeaching evidence was offered, may be regarded, for the purposes of the discussion, as a witness rather than as a party. His letter contained threats calculated to intimidate Mann into swearing falsely before the grand jury in respect of material facts in the case. We are of the opinion that, by the weight of authority, the letter was

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<sup>13</sup>These citations of Leonard's extensive testimony on rebuttal suggest that Gibson was in error when he said in his Opening Brief, "In fact, the prosecution itself had so little confidence in Leonard's capacity for truth that he was not submitted as a rebuttal witness though practically every part of his testimony was contradicted over and over again by prosecution witnesses, defense witnesses, and defendants." [Gibson's Op. Br. 37.]

admissible in proof of the witness's corrupt intentions relative to 'the case in hand'. . . ."

*State v. Moore*, 180 Ore. 502, 176 P. 2d 631, 633 (1947).

See also:

*People v. Alcalde*, 24 Cal. 2d 177, 184, 148 P. 2d 627, 630 (1944);

3 Wigmore on Evidence (3rd Ed. 1940) at pp. 498-499, 516-517 (§§948, 949, 960).

This Court has also followed this rule of impeachment for bias:

" . . . The propriety of showing the bias of a witness not only by cross-examination but by extrinsic testimony of other witnesses is well settled. . . ."

*Greatbreaks v. United States*, 211 F. 2d 674, 676 (9 Cir. 1954);

*Cf. Ewing v. United States*, 135 F. 2d 635, 640-642 (D. C. Cir. 1943), *cert. den.* 318 U. S. 776 (1943).

Stanley falsely denied having told a completely different story to Bascom at the California State Athletic Commission when he was called in for questioning in the Spring of 1960 about calls to him from Sica. Bascom established the prior inconsistent statement. Stanley falsely denied repeated attempts to intimidate Leonard with the not too subtle threat of the presence of a convicted murderer and countless reminders during the months before and after the indictment, while the case was awaiting trial, that Leonard was being

foolish to risk his family and his own life to the peril of the conspirators, for Nesseth and McCoy.

His role as a criminal emissary of Sica, as an advocate for corruption, was not suppressible under any rule of evidence applicable in the federal courts. To merely state such a proposition is to refute it:

“The witness’ attempt to bribe another witness to speak falsely to [sic] or abscond indicates for the case in hand a corrupt intention on the first witness’ part, and thus affects his trustworthiness. . . .”

3 Wigmore on Evidence, *supra*, at p. 516 (§960).

This extrinsic impeaching evidence was carefully limited by Judge Tolin’s instruction to the jury at the time the evidence was received. He cautioned the jury that the evidence of conversations and acts between Stanley and Leonard was offered not for the truth of what Stanley conveyed to Leonard, but as evidence of the fact that Stanley had tried to convey certain impressions to Leonard. [44 R.T. 6690-6692.]

Sica must suffer the consequences of vouching for a corrupt accomplice as a truthful witness. The rules of evidence are not designed to conceal such essential evidence on credibility from the court and jury.

#### 11. Denial of Bail During Trial.

Appellants Palermo, Carbo, Sica, and Dragna claim that they have been denied due process of law and equal protection of the law because their bail was terminated at the outset of the trial. [See Palermo’s Supp. Op. Br. 13.]

All appellants, with the exception of Carbo, were at liberty on bail from the time of the indictment, September 22, 1959, until the trial commenced on February 21, 1961. Carbo was in the custody of the State of New York serving a two-year penitentiary sentence. His sentence was completed on the first day of the trial.

All appellants were remanded to custody that day. Gibson was admitted to bail again the same day. On appeal, this Court held that the record in the district court must reflect a reasonable foundation upon which to deny bail during trial.

*Carbo v. United States*, 288 F. 2d 282 (9 Cir. March 3, 1961).

A proceeding followed in the district court in which appellee made an extensive evidentiary showing with respect to appellants and the trial judge again denied bail. On appeal this Court ruled:

“We conclude that ample foundation was shown for the ground relied upon by the court, namely, that revocation of bail was necessary to remove a substantial threat to the safety of one or more Government witnesses. We hold that the trial court did not abuse its discretion in denying on this ground the motions to reset bail.

“It is accordingly unnecessary to decide whether a sufficient foundation was established for the other ground relied upon by the court—the likelihood that one or more of the appellants might abscond.”

*Carbo v. United States*, 288 F. 2d 686, 690 (9 Cir. March 15, 1961), *cert. den.* 365 U. S. 861 (March 27, 1961).

This Court has set forth the test for denying bail during trial:

“When a criminal trial is in actual progress there must be an accommodation between the right of a defendant to be free on bail and the inherent power of the court to provide for the orderly progress of the trial. . . .

“If, however, there is reason to believe that a trial actually in progress may be disrupted or impeded by the flight of the defendant, or by his activities in or out of the courtroom during the trial, the fair administration of justice is itself jeopardized. In that event the court may give precedence to its inherent power and revoke bail if necessary for the duration of the trial.”

*Carbo v. United States, supra*, at p. 285.

This Court cited *United States v. Rice*, 192 Fed. 720 (C. C. S. D. N. Y. 1911), and directed attention to *Fernandes v. United States*, 81 S. Ct. 642 (1961), in which Mr. Justice Harlan, sitting as Circuit Justice for the Second Circuit, affirmed the action of the Second Circuit, which had affirmed the trial court's exoneration of bail for a number of defendants, *sub. nom. United States v. Bentvena*, 288 F. 2d 442 (2 Cir. Feb. 7, 1961).

In arriving at these conclusions, both Mr. Justice Harlan in *Fernandes*, and this Court in *Carbo* have taken into account the decision of the United States Supreme Court in *Stack v. Boyle*, 342 U. S. 1 (1951), and have concluded that:

“. . . District Courts have authority, as an incident of their inherent powers to manage the con-



duct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice. . . .”

*Fernandez v. United States, supra*, at p. 644.

Since the record contains voluminous documentation supporting the trial judge’s action in exonerating bail, we will not attempt to restate its contents in this brief. [See *e.g.*, III C.T. 533-574 and 7 R.T. 968-973.] Moreover, this Court in its second bail decision in this case [288 F. 2d 686], has included some of the persuasive evidence upon which the trial judge predicated his decision. Suffice it to say, that Carbo, Palermo, Sica and Dragna had criminal backgrounds, and Carbo and Palermo came from districts outside of the Southern District of California. While Palermo claimed Philadelphia as his home, Carbo was not known to have any particular place of residence, and both travelled continually about the country. Sica was a three-time convicted felon, with a long record of violence in the Los Angeles area. Carbo had been convicted of manslaughter several years after his indictment for murder in the first degree. During the period between that indictment and conviction, Carbo was a fugitive from the State of New York for several years. Carbo was arrested on three other occasions for murder, and was reputed to be a member of Murder, Incorporated. He had been tried in Los Angeles for murder in the first degree, the trial ending in a mistrial because of disagreement among the jurors. Carbo was not retried because of the death of one witness and the refusal of the New York District Attorney to produce a sec-

ond witness for the California authorities. Palermo had been convicted of a misdemeanor in Philadelphia, and subsequently was charged with assault with intent to kill and reckless use of firearms.

The record in the trial showed that he was a close associate of Carbo and was connected with Carbo in the transmission of death threats to Leonard and Nesseth. During the period of the conspiracy, Palermo had travelled about the country and had obtained underworld assistance in an effort to coerce Nesseth into releasing part of his interest in Don Jordan. Palermo was connected with the death threats of January 27, 1958 and April 28, 1959, and was with Sica at the time threats were made in the Beverly Hilton Hotel on May 2 or 3, 1959. Dragna, like Sica, had a notorious reputation in the Los Angeles area; and although he had never been convicted of a crime, his associations and conduct during the conspiracy were such as to clearly identify him as a person willing to employ violence in order to control the conduct of the prosecution witnesses.

In addition to the backgrounds of the appellants, the trial court had before it a great deal of evidence including the affidavits of Leonard and his wife (*sub. nom.* Leonard Blakely and Jeanne Blakely) who deposed that for a period of twenty-one months, and continuing after the commencement of the trial, they had been the recipients of over two hundred threatening telephone calls at home and at work, and that among other things Leonard was told he would never live through the trial; that his children would get hurt and that, with reference to his wife, he was told, "This is your last chance. Have youse ever seen a broad's gut

splattered?’ ”, and, “ ‘Have you ever seen a broad spread eagle? Well, if you testify you’ll see it. Remember this on the stand.’ ” [III C.T. 533-537.]

Although appellants argue that remand during trial somehow denied them access to counsel, they have been unable to demonstrate the truth of this assertion. To the contrary, defense counsel were given easy access to their clients. [II C.T. 488; 2 R.T. 177-178; 3 R.T. 386-387; 18 R.T. 2737.]

Moreover, during the long period between the indictment and the trial, all of the appellants, except Carbo, were enlarged on bail with ample opportunity to assist in the preparation of their defense. Carbo, of course, as noted above, was serving a penitentiary sentence in the State of New York.

Although appellants couch their argument in terms of denial of due process, they reassert the same contentions urged upon this Court in *Carbo v. United States*, *supra*, 288 F. 2d 282, and 288 F. 2d 686. Since appellants have not raised any facts appearing in the record subsequent to these decisions, appellee respectfully submits that this Court is bound by the law of the case; the matter is *res judicata*.

## 12. Conduct of the Prosecution and the Trial.

Appellant Gibson, through his counsel Ming, has, at every stage of this proceeding, challenged the good faith and ethics of appellee and its counsel. He does so again in his Opening Brief. [Gibson’s Op. Br. 45-48.] Appellee will deal succinctly with each point raised by appellant.

(a) *Alleged Promise That the Indictment Against Gibson Would be Dismissed.*

Gibson repeats his charge that prior to trial the Government, to his prejudice, promised to dismiss the indictment against him. Since extensive memoranda, supplemented by affidavits, have been filed and appear in the Clerk's Transcript [V C.T. 1208-1210, 1211-1214, 1300-1322], their contents will not be repeated in this brief. There is very little that can be said on the point that has not already been said in the cited documents. Appellee respectfully urges the Court to consider these pleadings and affidavits.

The Gibson argument on this point is founded upon false hopes and forged documents. In the light of what Mr. Gibson must know concerning the authenticity of the documents, appellee wonders if he is acting in complete good faith when he urges this Court to deal with the subject. Suffice it to say, Gibson was furnished with forged documents which purported to demonstrate the Government's intention to dismiss the charges against him. These documents (a telegram falsely signed with the name of an Assistant United States Attorney; a forged letter purportedly signed by William Hundley, then Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice; and a forged stipulation to dismiss the indictment against Gibson, purportedly signed by Laughlin Waters, then United States Attorney for the Southern District of California) were fabricated by a highly paid representative of Gibson and were exhibited by representatives of Gibson to an Assistant United States Attorney in an effort to ob-

tain a dismissal from the Department of Justice. Although the forger himself denied that Gibson or his attorneys were aware of the false character of these documents, there is no doubt that both Gibson and his attorneys now know that they were counterfeit. For this reason appellee questions the good faith of Gibson's contention and suggests in this Court as it did below that if misconduct has occurred, it is to be found with appellant and not with the Government. Appellee welcomes a judicial inquiry into the conduct of all counsel in this matter.

The statement appearing in Gibson's Opening Brief on page 47, with respect to Judge Boldt's finding "that defense counsel were guilty of no misconduct and decided that the matter was moot", is incorrect. (It is to be noted that Gibson offers no citation to support such a statement.) Judge Boldt ruled as follows:

"The Court: There is one other matter that I wish to dispose of, and I think it can be done quickly, before hearing anything that counsel may wish to present, and that has to do with the motion of the plaintiff to strike certain portions of the material submitted by the defendant Gibson on motions to dismiss.

"I will simply say this, that I now find and hold that there is no showing of misconduct of plaintiff's counsel in the particulars referred to in the motion to dismiss, nor even any evidence that I regard as substantial or credible tending to show it.

"In the last response of defendant Gibson it is stated that the defendant has not asked the court



to accept or rely on the documents in question, he does not do so now, and neither he nor his counsel can now vouch for their authenticity, nor have they ever been able to do so or have done so.

“In view of this position it seems to me that the issue is moot and I see no point in taking the time or thought to consider striking the material. It is not necessary and therefore I decline to rule on it.

“I will simply say that representations of misconduct of counsel in any important particular are very grave and serious matters which should not lightly be asserted and without substantial and credible and authenticated information to justify it.

“I think it is not necessary to suggest that there has been any violation in this particular in that respect, and therefore I will simply leave it at that.” [52 R.T. 8049-8050.]

(b) *Allegations of Distortion by the Prosecution During Closing Argument and Improper Rebuttal Argument.*

(1) Appellant Gibson in his Opening Brief at page 47 claims that the prosecution distorted the evidence during closing argument, although, says Gibson: “Reasonable limitations of space will not permit detailed analysis of the extent to which the prosecution on closing argument distorted the evidence in a fashion which inevitably misled the jury.”

Counsel for Gibson made a similar statement to the jury in his final argument, saying: “I am going to pass up an awful temptation. I have in my notes some hundred or one hundred ten items about which I should like to comment on Mr. Goldstein’s state-

ments in his argument. . . .” [48 R.T. 7401.] At no time during his final argument nor at any other time has Gibson’s counsel been able to demonstrate the truth of this assertion. Appellee respectfully submits that its argument with respect to Gibson was carefully phrased and fully supported by the evidence.

(2) The statement of appellant Gibson that during rebuttal argument appellee raised two matters not referred to *by the prosecution* in its opening argument is misleading. Obviously, rebuttal argument is intended to *answer the defense argument* and the prosecutor did not go beyond this in the course of his rebuttal. The record citation set forth by Gibson to support his contention [49 R.T. 7588-7589] is an effort to republish before this Court the scandalous charge made by Gibson’s counsel at the bench when he called the prosecutor “a liar”. [49 R.T. 7589.] Gibson’s counsel had contended that the prosecutor’s argument concerning exhibits Z-36 and Z-37 was improper rebuttal. The prosecutor pointed out to the district court that attorney Ming had discussed Z-36 and Z-37 at length during his summation. Ming denied this, at which point associate counsel for the prosecution reminded him that he had actually held up Z-36 and Z-37 to the jury while he was discussing them, whereupon Ming made his slanderous and intemperate accusation, referred to above, and nearly provoked a fist fight at the bench. Of course, the fact is that the record shows Ming’s reference during his argument to Z-36 and Z-37 at 49 R.T. 7457. Appellee respectfully submits that the purpose of Gibson’s reference to this incident in his brief is to create an impression with the Court that appellee’s counsel acted improperly. Here again, the impropriety, if any, is to be found elsewhere.

(c) *Knowing Use of False Testimony.*

Of all of the charges made by appellant Gibson, this is the most outrageous, for it suggests that counsel for the prosecution have suborned perjury. [See Gibson's Op. Br. 54.] Gibson asserts that the Government "offered evidence, particularly testimony of Jack Leonard, which the prosecution knew was false and misleading in material parts." This charge is irresponsible and without foundation in fact. Carbo, in his Opening Brief, at page 44, footnote 3, impliedly makes the same suggestion. In support of this contention, he refers to appellee's final argument at 47 R.T. 7055 where appellee stated to the jury with reference to Mrs. Leonard's trip to Philadelphia, that "There would seem to be no question that they had talked about this before she went and that they had decided that if Mrs. Leonard obtained a sum of money or promise of a sum of money that Leonard would attempt to leave the country. I don't think there is any doubt of that."

The Government at no time characterized Leonard's testimony as "false" in any respect and, as a matter of fact, it is the Government's position to this day that Leonard testified fully, truthfully, courageously, and to the best of his ability, and that he did not knowingly lie or distort in any aspect of his testimony. Furthermore, as Judge Boldt pointed out in his Memorandum Order denying motions for new trial:

"The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseth or both. Their testimony, in all essential particulars was fully and convincingly corroborated." [VI C.T. 1448.]

(d) *The Question to Carbo's Counsel by the District Court During Summation.*

Appellant Carbo claims he was prejudiced when the Court interrupted his counsel's argument to the jury to inquire for the basis for his statement that Carbo "lived in Miami, Florida, and had made his home there for ten years." [Carbo's Op. Br. 79-80. See 48 R.T. 7293.] Perhaps recalling the testimony of several defense witnesses who testified that they knew Carbo for years but had no idea now where he lived, what his telephone number was, what business he was in, or whether or not he had an office, the trial judge inquired of Carbo's counsel:

"Mr. Beirne, what evidence is there in the record that he lives in Miami, Florida, and made his home there for ten years?" To which, counsel replied, "Mr. Palermo testified to that." [42 R.T. 7293.] The court then said: "You are drawing on the testimony of Palermo," and counsel said: "Yes, your Honor." This was the extent of the colloquy which Carbo claims prejudiced him. In view of the record in the case, the trial judge was quite charitable since, during cross-examination Palermo gave the following testimony:

"Q. Did you ever go up to Mr. Carbo's home?

A. What home are you talking about?

Q. Well, where was Mr. Carbo's home? A. I don't know.

Q. Well, did Mr. Carbo ever invite you to his home? A. Never invited me to his house. *I didn't even know he had a home. That's the truth, Judge.*"

[39 R.T. 5855. Emphasis supplied.]

### C. The Instructions.

#### 1. The District Court Fully Complied With Rule 30.

Dragna and Gibson complain that the district court did not inform them of the specific contents of the jury instructions in advance of their final arguments. Therefore, they contend, the court did not comply with Rule 30, F. R. Crim. P. [Dragna's Op. Br. 26, 39-43; Gibson's Op. Br. 53.] The court made the following remarks before counsel commenced their arguments:

"... The rule requires I advise you as to my intended action on the requests for instructions.

"Now, while perhaps you submitted five or eight, the numbers submitted by all counsel in the case add up to a tremendous number, and the court has rejected them all in the language in which submitted. This is not to say the principles of law in them are rejected, but your particular handiwork and draftsmanship is rejected.

\* \* \* \* \*

"I had thought since there were many particular instructions and the rule requires that you be informed as to what I am going to do with respect to the particular ones you requested, which I interpret to mean the very language which has been suggested, that I had intended to say to you that if you would pull out a few that you particularly wanted given, that maybe I would give them in your language and I would tell you tomorrow morning first thing if you gave me a memo on it today.

\* \* \* \* \*



“But the additional matter you have filed alerts me to the subject matter. I will go into the subject matters suggested, but I am not going to accept any of the proposed instructions as to language, that is, as it now stands. You may submit others if you want, even during argument, but in a case of this kind the court has to tailor its charge to the needs of the case, and I think many of these general instructions, while applicable, are on the whole, when just taken as a complete body, somewhat confusing and they are prolix.

“. . . The reason I don't tell you what I am going to give is I haven't heard your arguments and I cannot intelligently tell what needs to be emphasized in the charge until I have heard the case shaped up by the arguments of counsel.

\* \* \* \* \*

“I think the purpose of the rule is that if you submit instructions on a particular point you are entitled to know whether the judge is going to give it or not, because if he is not you might argue on the theory he intends to give it and then if he doesn't give it, you are kind of cut off.

\* \* \* \* \*

“But I felt, just on reading the total body of instructions submitted, as I have said many times, they are prolix, so in the form in which tendered they are rejected, but the court will try, during the time that the jury argument is being made, to develop a charge which will conform to the law and will take into account the accusations and the defenses that are emphasized here in argument

and as to which the jury should be particularly informed.

“You see, Judge Yankwich has a method by which he writes the instructions in advance and hands them to counsel. I just can’t work that way. I find that if you try to do that, you get on the horns of a dilemma. Counsel begin, in some cases, embroidering upon the court’s instructions, and I am not going to put myself in a straitjacket.” [45 R.T. 6787-6790.]

The trial judge was unquestionably correct in his observations. The arguments of counsel consumed four days and about 800 pages of the Reporter’s Transcript. [46 R.T. 6820-49 R.T. 7616.] The court’s charge to the jury lasted nearly three hours and was carefully tailored to structure the law to the case as it was presented to the jury in the lengthy summations of counsel. [50 R.T. 7634-7732.]

As argued to the jury, this case did not turn upon any nice interpretations of the applicable law. The issue for the jury was whether appellants planned and executed a conspiracy to commit extortion. The prosecution contended that they did. Appellants contended that the prosecution’s evidence should not be believed. Appellants have not even attempted to show that their arguments to the jury were in any way prejudiced by the court’s rejection of their offered instructions on the ground of prolixity. While there were many factual issues to debate in summation, the legal issues presented by the instructions were neither novel nor difficult.

Construing Rule 30 earlier this year, this Court held:

“Since counsel for appellant was in no manner inhibited or restricted in his argument to the jury, we find no prejudice to appellant by the failure of the court to observe the provisions of Rule 30 . . . and appellant has suggested none.”

*Watada v. United States*, 301 F. 2d 869 (9 Cir. 1962).

2. **The Jury Was Properly Instructed Upon the Use of Declarations of a Co-Conspirator With Respect to Membership in the Conspiracy.**

Carbo, Palermo, and Dragna, assert that the jury was not properly instructed upon the use of evidence showing acts and declarations of co-conspirators. [Carbo's Op. Br. 22-33, 53-58; Palermo's Op. Br. 7-8, 16-18; Dragna's Op. Br. 20-26, 35-37.] The district court instructed the jury on the law of conspiracy at length, during the presentation of evidence and in its charge to the jury before they retired to deliberate. The court's instructions relevant to this contention of error are collected in Appendix F, below.

(a) *Declarations of a Co-Conspirator.*

Consideration of the instructions given by Judge Tolin reveals that he did instruct the jury that the declarant's membership in the conspiracy must be established by evidence apart from his declaration, before the declaration may be used against his co-conspirators. For example, during the reception of evidence, the trial judge cautioned the jury as follows:

“I will tell the jury that, of course, when any one of a group of conspirators makes a statement in furtherance of the purpose of the conspiracy, that is binding on all the conspirators. But that rule only applies if there are co-conspirators.

“Now, before you can hold any one of these defendants to be bound by this conversation with Mr. Palermo, if you believe there was such a conversation, it would be necessary for you to find from other evidence that such person, as to whom you are making applicable that conversation, was in fact a conspirator.” [12 R.T. 1664-1665.]

After instructing the jury upon the necessary elements of a criminal conspiracy, the district court said:

“Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators may be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making the declaration.

“The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants or either of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly.” [11 R.T. 1630; 50 R.T. 7655-7657.]

The foregoing instructions, as well as the additional instruction given at the request of Gibson [50 R.T. 7713-7715], substantially state the proposition of law which Carbo and Palermo claim was rejected by the court: that the jury must be satisfied that a declarant or actor was a member of the conspiracy before his words or acts in furtherance of the conspiracy and during the period of the conspiracy may be considered against the co-conspirators. However, to the extent that appellants urge that the jury should have been instructed to make a finding upon the *competency* of evidence which has been admitted by the court dur-



ing the presentation of proof, their requested instructions do not state the applicable law and were properly rejected.

In his opinion affirming the conviction of the principal officials of the Communist Party of the United States, Judge Learned Hand analyzed appellants' contention of error and demonstrated its inherent fallacy. His discussion of the question is worth quoting at length:

"All these declarations the judge left to the jury with the following instruction: 'Before you could consider this evidence against the defendants, or any of them, you would have to be convinced beyond a reasonable doubt that the instructor in question was a member of the conspiracy with knowledge of its aims and purposes, and, that the teaching in question was during the period of the indictment and in furtherance of the aims and purposes of the conspiracy. \* \* \* If you are convinced beyond a reasonable doubt that one or more of the defendants knowingly were parties to such conspiracy, you may consider the acts and statements of co-conspirators engaged in the same enterprise and done or said in furtherance of the conspiracy and in the time specified in the indictment, just as though such statements and acts were said and done by the defendant or defendants who were found by you to be members of the conspiracy.' It is not clear in the books that these instructions did not too much confine the jurors' use of the declarations, for it directed them not to regard them at all unless they

were first convinced beyond reasonable doubt that the declarant and the defendants were engaged in a common venture which the declarations helped to realize. *It is difficult to see what value the declarations could have as proof of the conspiracy, if before using them the jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged; for upon that hypothesis the declarations would merely serve to confirm what the jury had already decided.* In strict logic these instructions in effect altogether withdrew the declarations from the jury, and it was idle to put them in at all. The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but *we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent.* Indeed, it is a practical impossibility for laymen, and for that matter for most judges, to keep their minds in the isolated compartments that this requires. In *United States v. Pugliese*, 2 Cir., 153 F. 2d 497, 500, the charge was against the husband and wife as joint possessors of illegal liquor; and the husband was convicted and the wife was acquitted. The question arose as to the competence of the wife's declaration against the husband, and we

held that they were competent; yet obviously, if the jury used the declarations against the husband they must have done so without being satisfied beyond a doubt that she possessed the liquor in concert with him. Of course, they may have found the evidence against him enough without recourse to the declaration, but they were not so instructed. Instead we said: 'The admissibility of the wife's declarations in the case at bar was for the judge, and the fact that the jury later acquitted her was irrelevant. *The issue before him was altogether different from that before them: he had only to decide whether, if the jury chose to believe the witnesses, Pugliesi and his wife were engaged in a joint undertaking; they had to decide whether they believed the witnesses beyond a doubt.*' No doubt, this conclusion permits the jury to act upon hearsay, because they may be satisfied of the 'joint undertaking' only because of the declaration; but it often happens that hearsay is competent, and this is the only practicable way to deal with the question." [Emphasis supplied.]

*United States v. Dennis*, 183 F. 2d 201, 230-231 (2 Cir. 1950), affirmed 341 U. S. 494 (1951).

Judge Hand's analysis points up the dichotomy between the function of the court and the function of the jury in weighing evidence in a conspiracy case. The trial judge must determine if a *prima facie* case linking the declarant with the conspiracy has been made out before unconditionally admitting his extrajudicial

declaration against the indicted co-conspirators. It is in connection with this ruling upon *admissibility*, that the Supreme Court cautioned that evidence independent of the declaration must exist before finding the declaration admissible, "Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."

*Glasser v. United States*, 315 U. S. 60, 73-75 (1942).

This does not mean that the *jury* must second-guess the trial judge on the question of the *competency* of evidence which he has admitted for their consideration. Their sole function is to consider all of the evidence which the court has admitted to determine whether each person alleged to be a co-conspirator was in fact a conspirator in the conspiracy charged in the indictment. If so, then all acts and declarations of each member of the conspiracy are to be considered in determining the one issue before the jury, to wit: did the prosecution establish beyond a reasonable doubt the existence of the conspiracy charged and the membership therein by each named defendant.

Thus, appellants have misplaced their reliance on the holding of the *Glasser* case. This analysis of the holding of *Glasser* is confirmed by the leading recent commentary on the law of conspiracy which cites the *Glasser* opinion for the proposition that only a *prima facie* foundation by independent evidence of the declarant's

conspiratorial status is necessary in order to admit such evidence. *Glasser* has nothing to say on the question of instructing the jury in the use of such evidence once it has been received.

*Developments in the Law of Conspiracy*, 72 Harv. L. Rev. 920, 984-985; 987, fn. 510 (1959).

The same distinction, between *prima facie* evidence of membership for purposes of admissibility and the use of all admitted evidence for determination of guilt beyond a reasonable doubt, was recognized by Mr. Justice Sutherland, Mr. Justice Stone, and Circuit Judge Clark in their affirmance of the conviction in the *Manton* conspiracy case:

“In the foregoing recital of facts and circumstances, to which others less significant might be added, we have set forth some matters with respect to which Manton’s immediate connection is not shown by the evidence. And we have done so because of the light they shed upon the relevant evidence in respect to Manton’s partnership in the conspiracy and the aid they furnish toward a better understanding of that matter. But in considering the contention that the court erred in submitting to the jury the initial question whether Manton was a party to the conspiracy, we have put these facts and circumstances aside. *Of course, Manton’s partnership in the conspiracy being settled prima facie, these matters become relevant as acts and declarations of co-conspirators in*



*the execution of the conspiracy, by which Manton would be bound.”* [Emphasis supplied.]

*United States v. Manton*, 107 F. 2d 834, 843 (2 Cir. 1938), *cert. den.* 309 U. S. 664 (1940).

As Judge Hand noted in *Dennis, supra*, the trial judge must determine if there is a *prima facie* case showing membership in the conspiracy, by evidence *aliunde* the declaration, before admitting the declaration against all conspirators on trial. Once that hurdle has been crossed, the evidence is as competent as all other direct and circumstantial evidence which tends to establish the existence of the conspiracy. The jury may use it in its consideration of the only issue before them: did a membership exist and who was a member of it? To ask the jury to compartmentalize each declaration and decide those two questions by resorting to all the evidence except the declaration, means, in reality, to direct the jury to disregard the declaration altogether until they have decided the question of guilt. At this point in the jury's deliberations the evidence of such declarations would be academic. Furthermore, an instruction which asks the jury to perform such a psychological exercise, is an act of futility, since it conflicts with the instructions upon the use of circumstantial evidence, which are clearly proper in a conspiracy case, as in any criminal case. [50 R.T. 7656-7657.]

(b) *Membership in the Conspiracy.*

If Dragna had complied with this Court's Rule 18(2)(d), his specification of error would have answered itself. [Dragna's Op. Br. 21-26.] He failed

to set forth the instructions which Judge Tolin gave on the proposition that proof of knowledge of the illegal objects of the conspiracy is a necessary element in establishing the membership of each appellant in the conspiracy. The court gave complete instructions and an excellent illustration of this point. [50 R.T. 7653-7655, 7657, 7677-7678.] The Santa Claus story pointedly explained the necessity that the jury find that each appellant had knowledge of the criminal nature of the extortion conspiracy before they could lawfully find him guilty.

3. The Instruction Upon the Use of Good Character Evidence Properly Stated the Applicable Law.

Judge Tolin instructed the jury at some length upon the use of evidence of a defendant's good reputation in the community to suggest the probability that he did not commit the crime charged. [50 R.T. 7695-7699.] Since anything established in the record, indeed the absence of anything in the record, might justify a reasonable doubt in the jury's mind about a defendant's guilt, it follows that if such good reputation evidence is admissible to prove the probability of innocence, such evidence in and of itself might justify the jury in acquitting the defendant. However, that does not mean that the defendant is entitled to an instruction *as a matter of law* in which the trial judge *argues* this inference for the defendant.

Since federal judges *may* comment upon the weight of the evidence, *in their discretion*, it would be a strange rule to *require* the trial judge to assert in all cases, no matter what the state of the record, and no matter whether he thinks the point deserves emphasis or

not, that the jury may acquit solely upon such evidence of good reputation. And this is not the law.

*Allen v. United States*, 4 F. 2d 688, 694-695 (7 Cir. 1925), *cert. den.* 267 U. S. 597, 598, 268 U. S. 689 (1925);

*Linde v. United States*, 13 F. 2d 59, 61-62 (8 Cir. 1926).

*Johnson v. United States*, 269 F. 2d 72 (10 Cir. 1959), cited by Gibson, does not state the majority view. The Tenth Circuit has misinterpreted the holding of *Edgington v. United States*, 164 U. S. 361 (1896). *Edgington* merely holds that evidence of the defendant's good reputation is *admissible* as tending to establish the probability that he did not commit the crime charged. It does not even suggest that the jury must be instructed in accordance with Gibson's Special Instruction F. To the contrary, the opinion suggests that the court should treat good reputation evidence no differently than any other defensive evidence in a criminal case. The Tenth Circuit's view is based neither upon reason nor authority and should not be followed by this Court.

#### 4. The Court Correctly Instructed Upon the Commerce Element in Count One.

Gibson says that the trial judge failed to make a finding upon "whether the prosecution has adduced evidence to demonstrate that the defendant's activities complained of affect interstate commerce. . . ." [Gibson's Op. Br. 56-57.] The district court made such a finding by describing several of the economic facts in the record which if found by the jury to exist (they were not contested by appellants) constituted interstate

or foreign commerce within the meaning of the Hobbs Act, 18 U. S. C. §1951. [50 R.T. 7658-7660, 7667-7668, 7670-7672.]

Abundant evidence was received on the issue of interstate and foreign commerce. The contract for the Jordan-Gutierrez fight at the Olympic Auditorium on January 22, 1959, was negotiated by telephone between Los Angeles, California, and Mexico City, Mexico. Furthermore, the Los Angeles promoters of that fight had discussions concerning this bout with Gutierrez's manager while they were in Mexico City. Finally, the promoters paid the traveling expenses for Gutierrez and his manager from Mexico City to Los Angeles. [18 R.T. 2635-2640; Exs. 116-118.]

The second Jordan-Akins championship fight on April 24, 1959, was nationally televised. The promoter's arrangements for the bout were almost exclusively of an interstate nature. [18 R.T. 2603-2604, 2611-2613.] Title Promotions, Inc., a corporation owned by Gibson, located in Chicago, Illinois, handled the televising of the fight for Muchnick, who was located in St. Louis, Missouri. The sponsor of the television aspects of the bout was the Gillette Safety Razor Company of Boston, Massachusetts. Gillette paid Muchnick \$55,000 from which he disbursed \$15,000 to each fighter for the television rights to his performance, \$12,500 to the Chicago Stadium Corporation, \$6,250 to Title Promotions, Inc., and \$6,250 was retained by Muchnick. [18 R.T. 2620-2621.] It was from Jordan's share of this fund (as well as from his share of the "gate" from paid attendance at the fight) that Carbo's and Palermo's "fifteen percent off the top" was supposed to be paid.

The foregoing evidence, demonstrating the interstate and foreign commerce aspects of the two fights in which Jordan earned purses after becoming welter-weight champion and during the period of the conspiracy, was uncontested at the trial. As Judge Learned Hand said in the *Compagna* case:

“ . . . If these were the facts, the business was interstate as matter of law, and the question should not have been submitted to the jury; and since nobody contested the facts, but only their legal effect, it was unnecessary for the judge to say anything on the issue. . . .”

*United States v. Compagna*, 146 F. 2d 524, 527 (2 Cir. 1944), *cert. den.* 324 U. S. 867, *reh. den.* 325 U. S. 892 (1945).

On the conspiracy count the court alluded to some of the facts which establish the probable effect upon commerce which the attainment of the objects of the conspiracy would produce. The court's legal conclusion based upon these facts and the other jurisdictional facts in the record was clearly correct:

“Under the 1934 Act, it was not incumbent upon the prosecution to prove that it was the purpose of the conspiracy to affect interstate commerce. Indeed, in *Nick v. United States*, *supra* [122 F. 2d 673], the court specifically held that it was proper to charge that ‘it is not necessary for the jury to find that the defendants, in conspiring, considered that the effect of their conspiracy would be to affect interstate commerce or that one of the purposes of the conspiracy was to affect such commerce.’ The court stated, ‘All



that is necessary is that the conspiracy shall be to do something, the natural effect of which will be to affect interstate commerce.'

"We have no doubt that the same is true under the statute in its present form and, in this regard, we appear to be in agreement with the Court of Appeals for the Eighth Circuit . . . in *Hulahan v. United States* [214 F. 2d 441, 445-446 (8 Cir. 1954), *cert. den.* 348 U. S. 856)]. . . ."

*United States v Varlack*, 225 F. 2d 665, 672 (2 Cir. 1955).

If the extortion conspiracy had succeeded, the impact, upon all the parties to the interstate contractual relationships established in the record, and upon national television, would clearly have constituted an effect upon commerce in some "way or degree".

18 U. S. C. §1951.

##### 5. The Jury Was Properly Instructed Upon Proof of Overt Acts.

At one point in its charge to the jury, the district court explained the overt act element in a conspiracy offense as follows:

". . . It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid." [50 R.T. 7645.]

Carbo contends that this was error. [Carbo's Supp. Op. Br. 2, 4-6.] The overt act requirement was cov-

ered at an earlier portion of the charge in accordance with Carbo's view of the law [50 R.T. 7651-7652], but Carbo urges that there is a legal conflict between the two statements of the same rule which prejudiced his case.

In addition to giving instructions upon overt acts, the court read the two conspiracy counts to the jury. Both counts include only overt acts alleged to have been committed by appellants or co-conspirator Daly. [I C.T. 3-4, 10-11.] Secondly, the substantive counts under 18 U. S. C. §875(b) [Counts Six-Ten] appear as overt acts in the two conspiracy counts. [Count One: paragraphs 4(f), 4(g), 4(1), 4(m); Count Five: paragraphs 4(a)-4(e).]

Appellants Carbo and Palermo were convicted on each of the substantive counts in which they were named. Thus, the jury must have found that these overt acts in the two conspiracy counts had been committed by one or more of the appellants.

Furthermore, the instruction complained of is a correct statement of the law. Title 18, United States Code, Section 2(b), provides as follows:

“Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”

This statute recognizes the principle of criminal agency in the federal law. Since a defendant may be held liable for a completed criminal offense which he causes through another, *a fortiori*, he can be held responsible for the commission of an overt act in furtherance of a conspiracy which he causes through an-

other, since an overt act is one element of the conspiracy offense.

In any event, appellants never suggested to the court that it should make any change in the instruction given until after the jury had returned their verdicts. They waived this contention of error by their silence.

Rule 30, F. R. Crim. P.

With respect to Count One, which was brought under the Hobbs Act, 18 U. S. C. §1951, no instruction upon overt acts was necessary, since the overt act allegations are surplusage in an indictment charging a conspiracy under that statute.

*Ladner v. United States*, 168 F. 2d 771, 773 (5 Cir. 1948), *cert. den.* 335 U. S. 827 (1948);

*United States v. Tolub*, 187 F. Supp. 705, 709 (S. D. N. Y. 1960);

*United States v. Callanan*, 173 F. Supp. 98, 101 (E. D. Mo. 1959), affirmed 274 F. 2d 601 (8 Cir. 1960), affirmed 364 U. S. 587 (1961);

*Cf. Singer v. United States*, 323 U. S. 338, 340 (1945).

6. Definition of the "Underworld".

Dragna complains that the trial judge did not define "the meaning of the term 'underworld reputations'" for the jury. [Dragna's Op. Br. 20, 38-39.] No request for such a definition was made by appellants, nor did any appellant offer a suggested definition in writing pursuant to Rule 30, F. R. Crim. P. Nor did any appellant object to the court's failure to give an instruction on this subject before the jury retired.

The court's statement before the jury arguments, "I am not going to give the definition of underworld", was in answer to a facetious remark by Palermo's counsel which was certainly not a request that the court give a definition of "underworld reputations". [50 R.T. 6791.]

The phrase is not a term of legal art and its use in the two conspiracy counts [I C.T. 2, 10] was certainly not subject to the ambiguity of meanings suggested by Dragna. It was no more necessary for the court to define the meaning of "underworld reputations" as used therein, than for the court to define the meaning of "gun" in an armed robbery case. If the jury was sufficiently mature to understand the evidence presented in this extortion case, they were not "at sea" on this point.

7. The Aiding and Abetting Instruction Was Proper.

Carbo fears that the jury was confused by the instruction on the aiding and abetting statute, 18 U. S. C. §2. [Carbo's Op. Br. 33-35, 65-66.] It is clear that the instruction [50 R.T. 7714-7716] was applicable to Count Four which names Palermo and Sica jointly. [I C.T. 8.] Appellants did not request that the court limit the instruction to this count. The only objection raised before the jury retired failed to suggest any prejudice in the instruction. [50 R.T. 7719-7720.] There was no danger that the jury would misinterpret the instruction and convict any appellant under a count *in which he was not charged*.

Furthermore, the instruction related the two conspiracy counts to the eight substantive counts, which, as a factual matter, were mutually interdependent. The

relationship of appellants Gibson and Dragna, who were charged exclusively in the two conspiracy counts, to the commission of the substantive offenses by the other three indicted co-conspirators is certainly material to the jury's evaluation of Gibson's and Dragna's guilt or innocence under the conspiracy counts. Gibson and Dragna might well have been charged with one or more of the substantive crimes in this indictment under the theory of the *Pinkerton* case. The fact that they were not so charged does not mean that the evidence does not prove their status as principals to these substantive offenses, thereby shedding light upon their roles in the conspiracy.

*Pinkerton v. United States*, 328 U. S. 640 (1946);

*Nye & Nissen v. United States*, 336 U. S. 613, 619 (1949).

Carbo has failed to show how the instruction prejudiced him or any other appellant.

**8. The District Court's Cautionary Admonition to the Jury Was Beneficial Rather Than Detrimental to Gibson.**

During their deliberations, the jury requested to hear one of the tape recordings which had not been played during the presentation of evidence. [Ex. 176, which is substantially identical with Ex. 100, which was played during appellee's case-in-chief.] Before playing Exhibit 176, the court, out of an abundance of caution, restated its prior warning that the Daly-Leonard conversation could only be considered by them if they were satisfied that Daly was either a conspirator as charged or an agent of one of the conspira-



tors. [50 R.T. 7789.] Gibson contends that this admonition was prejudicial error, although he made no objection thereto during the trial. [Gibson's Op. Br. 55-56.]

Rule 30, F. R. Crim. P.

There was no necessity for the court to remind the jury that the exhibit could only be used against appellants under certain conditions. To repeat this admonition during the jury's deliberations certainly was not helpful to the prosecution. Insofar as the court's use of the word "agent", Daly's statements to Leonard were admissible against the appellants under the agency theory whether or not he was named in the indictment as a co-conspirator.

*Fuentes v. United States*, 283 F. 2d 537, 539-540 (9 Cir. 1960).

Finally, Gibson is unclear as to why, after three and one-half months of side bar conferences out of the hearing of the jury, he could not object to the instruction, if its effect was so prejudicial to his theory of defense. Gibson did not preserve the point below, his brief does not comply with Rule 18(2)(d), and, on the merits of the question, the contention of error is without substance.

9. **The District Court Instructed the Jury Properly and Repeatedly on Reasonable Doubt and the Presumption of Innocence.**

Palermo alleges plain error, because the court did not emphasize to the jury under what circumstances they had a duty to acquit the appellants. [Palermo's Op. Br. 7, 13-16.] The court instructed on the test for

conviction and acquittal, although not in the words selected by Palermo's counsel. Appellants offered no amendment to the court's instruction before the jury retired. An extensive instruction was given upon reasonable doubt at the outset of the court's charge to the jury. [50 R.T. 7638-7641.] In the course of that instruction, Judge Tolin told the jury:

“. . . And, whenever, after a careful consideration of all of the evidence, your minds are in the state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, *the conclusion of innocence must be adopted.*” [Emphasis supplied.] [50 R.T. 7641.]

Then, in connection with his statement of the elements of the offenses charged in each of the counts in the indictment, Judge Tolin repeatedly stated the rule on burden of proof. [50 R.T. 7653-7654, 7666-7667, 7669-7672, 7680-7686.]

Appellee submits that “the conclusion of innocence” which “must be adopted” is the legal equivalent of a “verdict of not guilty”:

“The court is not bound to accept the language which counsel employ in framing instructions, nor is it bound to repeat instructions already given in different language. . . .”

*Agnew v. United States*, 165 U. S. 36, 51 (1897).

Failure of so many experienced counsel to notice any deficiency in the court's instructions upon reasonable doubt and the presumption of innocence sug-

gests *prima facie* that the *plain error* suggested by Palermo did not occur. The instructions cited and quoted, above, settle the matter conclusively.

10. The Jury Was Not Lulled Into Apathy by the General Instruction Upon the Division of Functions Between the Court and Jury.

“ ‘When *I* use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’ ”

“ ‘The question is,’ said Alice, ‘whether you *can* make words mean so many different things.’ ”

“ ‘The question is,’ said Humpty Dumpty, ‘which is to be master—that’s all.’ ”

Lewis Carroll, *Through the Looking Glass* (The New American Library: New York, 1960) Chapt. VI, p. 186.

Like Humpty Dumpty, Carbo puts his unique gloss upon the beginning of the district court’s charge to the jury. [Carbo’s Supp. Op. Br. 1-2, 3-4.] Making words mean “so many different things”, he urges this Court to read Judge Tolin’s caution to the jury positively backwards. His looking glass interpretation is reinforced by quoting the remarks out of context. The full statement was as follows:

“At the close of all of the proceedings, prior to your deliberation, it becomes the duty of the judge to instruct you upon the law. You should always remember in our judicial system in these federal courts there is a sharp, very sharp difference between your duties as a jury and mine as the judge. The judge has the duty to research the law that is applicable to the case and

to state it for you. It would be very nice if it could be stated in something short like the Ten Commandments, but our law just cannot be so concise.

“You have the sole duty of deciding the facts, and I have no right to enter into that fact duty, that is, I cannot come over and be a member of you, nor can you come up here and look into the law.

“If I am wrong in what I tell you and it is a serious matter—if it is just trivia I might get a little reprimand for it from a higher court, but if it is just trivia it is not fatal to your verdict. If I seriously misinstruct you, then any verdict you return would be vitiated. *In other words, my word is subject to a review by higher courts; yours is not.*

“You are the finder of the fact. I didn’t say ‘finders’, I said ‘finder’, because unanimity is required.

“It is contemplated you will take whatever time is necessary. I have had a lot of cases where the matter of an hour or so has been all that was necessary. I have had short cases in which a matter of a couple of days have been necessary. You take whatever time is necessary, but come to one mind on this case. Your verdict must be unanimous.

“*Now, the reason why your decision on the facts is not subject to review on appeal is simply that this has been a trial in open court. Any reasonably competent, trained lawyer can find out what the law is. Any reasonably competent ap-*

pellate judges can determine whether that lawyer has done well on his advising the jury as to the law. But an appellate court, if they come to a review of this case, which we don't know—it is in the potential that they might—that appellate court will not see the witnesses. You have seen them from the time they came forward to take the oath until they left the stand, and that visual attention which you have given to the witnesses, your observation of the way in which they respond, the kind of people they are, is something that just cannot be picked up from a stenographic transcription of what went on here.

“Therefore, since these intangibles enter so so greatly into the appraisal of the witnesses' testimony, it is said that only those who saw and heard the witnesses are to judge what is true, what is confused, what is false. *Hence, you are the sole judges of the evidence*, but you must take the law as the judge declares it.” [50 R.T. 7634-7636. Emphasis supplied.]

The jury was not lulled into any state of apathy based upon a false impression that their verdict on the facts was only tentative and not final—unless they were deaf.

#### **D. Appellants' Supplementary Motions for New Trial Based Upon Judge Tolin's Death Were Properly Denied.**

It is well established that if the trial judge dies after the jury returns a verdict, but before disposition of post-verdict motions, entry of judgment of



conviction, and pronouncement of sentence, another judge may perform these functions.

Rule 25, F. R. Crim. P.;

*Connelly v. United States*, 249 F. 2d 576 (8 Cir. 1957), *cert. den.* 356 U. S. 921, *reh. den.* 356 U. S. 964 (1958).

See also:

*Miller v. Pennsylvania Railroad Co.*, 161 F. Supp. 633 (D. C. D. C. 1960).

An exception arises *only* when the successor judge, in his discretion, finds that he cannot satisfactorily perform such functions by reason of the fact that he did not preside at the trial or for some other reason.

Rule 25, F. R. Crim. P.;

*Miller v. Pennsylvania Railroad Co.*, *supra*.

Rule 25 affords a defendant due process of law within the meaning of the Fifth Amendment to the Constitution.

*Connelly v. United States*, *supra*.

Case law on the subject is meager, but it is apparent that the death of the trial judge subsequent to jury verdict is not, in itself, sufficient ground for ordering a new trial. Rule 25 provides for assignment of the case to a successor judge. This is not an innovation in the law. In 1834, in *New York Life and Fire Insurance Company v. Wilson*, 8 Peters (33 U. S.) 290, 303, 8 L. ed. 949 (1834), the Supreme Court pointed out that, "The court remains the same, and the charge [*sic*] of the incumbents cannot

and ought not, in any respect, to injure the rights of litigant parties.”

Rule 25 requires only that the successor judge examine the record and arrive at a preliminary determination with respect to his ability to perform those judicial functions which remain at the district court level. If he should decide that he cannot perform those duties, “he may in his discretion grant a new trial.”

*Rule 25, F. R. Crim. P.;*

*Connelly v. United States, supra.*

Jury trial in the instant case commenced on February 21, 1961, and was completed on May 30, 1961. Judge Tolin set July 20, 1961, for argument on motions for new trial. On June 11, 1961, before he could hear oral argument or dispose of said motions, he passed away. On June 26, 1961, the case was reassigned to the Honorable George H. Boldt, United States District Judge, for all further proceedings; whereupon, each of the appellants filed supplemental motions for new trial, contending that a successor judge could not properly discharge the judicial functions remaining at the time of Judge Tolin's demise. On July 24, 1961, Judge Boldt heard extended oral argument concerning both the supplemental motions for new trial and the motions for new trial on the merits. On October 13, 1961, Judge Boldt denied the supplemental motions for new trial, holding that:

“The record clearly shows that the able and experienced trial judge conducted the entire proceeding with remarkable patience and restraint, giving fair and thoughtful attention to the fre-

quent and numerous objections and contentions presented by veteran and vigorous counsel. From a review of the entire record it appears to my complete satisfaction that all judicial duties and functions subsequent to verdict, including evaluation of the evidence for all necessary purposes, can and should be performed by a successor judge. To do so will require much time, effort and concern. Such considerations, however, will not justify evasion of judicial duty by the simple and easy solution of granting a new trial.” [VI C.T. 1343.]

Concurrent with his denial of the supplemental motions, Judge Boldt had already completed a 2,000 page rough draft of an abstract of testimony summarizing the 7,500 page trial record. [VI C.T. 1447.] This abstract was further condensed and is part of the record on appeal. The Abstract of Testimony consists of 1,320 pages and is in ten volumes. It should be dispositive of the question herein raised by the appellants, since it demonstrates the thorough study and analysis given by the successor judge to all of the evidence and issues in the case. Moreover, the successor judge has laid to rest the erroneous assertions of appellants to the effect that appellee’s case was based solely upon the credibility of Jack Leonard. Judge Boldt emphasized in his Memorandum Order, dated November 28, 1961 [See: Appendix D, below]:

“ . . . The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseth or both. Their testimony in all essential particulars was fully and convincingly corroborated. . . .” [VI C.T. 1448.]

Suffice it to say, the difficulty of a task does not determine the *possibility* of its accomplishment, nor does the intricacy of the legal issues compel a conclusion that they defy analysis by an experienced lawyer and trial judge. Appellants are saying very little when they refer to the length of the transcripts and the number of witnesses and exhibits to be found therein. To be sure, there are over 7,500 pages of testimony, and, as the successor judge himself pointed out, “359 exhibits were marked and 264 admitted in evidence, including several recordings.” [VI C.T. 1446.]

Yet, the case can be understood by reading the record and reflecting upon it. This is obviously the task which the successor judge undertook for himself in the fulfillment of his duties as a United States District Judge.

It defies reason to suggest that a lengthy case such as this should be retried after the verdict of the jury simply because another judge sitting on the same court as the trial judge with jurisdiction over the appellants must rule on post-trial motions. This is particularly true where an extremely experienced successor judge has demonstrated his understanding of the trial record and has concluded that there is no problem of credibility.

Appellants cite numerous cases in support of their contention that a successor judge cannot fulfill the duties of the trial judge.

*Brennan v. Crisco*, 198 F. 2d 532 (D. C. Cir. 1952), is a civil case in which the trial judge sat as the finder of fact. At the time of his demise, he had not made findings of fact or filed conclusions of law.

*Federal Deposit Insurance Company v. Siraco*, 174 F. 2d 360 (2 Cir. 1949), was also a non-jury case in which the successor judge was called upon to make findings of fact.

In *Smith v. Dental Products Co.*, 168 F. 2d 516 (7 Cir. 1948), the master died before making findings of fact or filing a report. Here again, there was no jury.

In the case of *In re Linahan*, 138 F. 2d 650 (2 Cir. 1943), the court was concerned with the alleged bias of a referee appointed by the district judge and the case has little significance for interpretation of Rule 25.

In *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F. 2d 77 (2 Cir. 1949), there is no mention of a successor judge and the case was on the civil calendar. The decision discusses the credibility of the plaintiff's witnesses.

In *United States v. Page*, 302 F. 2d 81 (9 Cir. 1962), there was no successor judge involved and no problem arose under Rule 25.

*Miller v. Pennsylvania Railroad Co.*, *supra*, is a district court decision in which Judge Holtzoff, sitting as successor judge in a civil case, reviewed the evidence and granted a motion for new trial. The case simply illustrates that a successor judge can weigh the evidence. Judge Holtzoff points out that:

“It is also necessary to bear in mind the necessity of undertaking the task in the spirit of what is known as the ‘harmless error’ rule. . . . This rule is quoted and must be stressed because unfortunately its mandate, in fact its very existence,



is frequently overlooked and at times even forgotten. It must not be permitted to wither and atrophy. It will not do to render purely lip service to this basic doctrine of modern administration of justice. We must not 'keep the word of promise to our ear, and break it to our hope.' Philosophically, rules of law are but a means to an end and not an end in themselves. Their objective is the achievement of substantial justice."

*Miller v. Pennsylvania Railroad Co., supra*, at p. 636.

It goes without saying that a trial judge has the power to grant a new trial and that in doing so he may consider not only what the witnesses said but their demeanor on the witness stand. However, in the year 1962, we are several steps beyond the superstitions and old-wives tales which teach that a witness is lying if his hands perspire, if he neglects to look his questioner in the eye, if he looks nervously around the courtroom, or if he stares at his feet, etc., through a catalogue of physical behavior which usually has questionable significance in the ascertainment of the truth. Indeed, one must know a great deal about a person before he can say that a particular behavior phenomenon indicates perjury. Some people have nervous giggles; others, twitches; some are myopic; others have glandular defects causing their hands to perspire. The pathological liar may look his questioner straight in the eye and be extremely persuasive during the short period of time he is on the witness stand. The usual trap for the pathological liar is the failure of his story to hang together internally and to jibe with the other evidence in the case.

In any event, new trials are not a matter of course and a preponderance of the evidence must appear in favor of the defendant before such a motion will be favored. As the court said in *United States v. Robinson*, 71 F. Supp. 9, 10-11 (D. C. D. C. 1947), citing *Metropolitan Railroad Co. v. Moore*, 121 U. S. 558-570, and other cases:

“ . . . If the Court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. Naturally, *this authority should be exercised sparingly and with caution. It should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.*” [Emphasis supplied.]

The record in the instant case is replete with instances of *absurd* testimony by appellants and witnesses called on their behalf. Because of the length of this brief, we will not attempt to collect more than a sample, but the Court might note:

1. Palermo's testimony that he did not believe in banks so he carried \$3,000 in currency in his “kick” [40 R.T. 5965];

2. Glickman's testimony that he “loaned” \$10,000 in currency to Carbo without a receipt to record the transaction [29 R.T. 4270-4271];

3. Gibson's sophistic distinctions between “knowing” Carbo and “meeting” Carbo [32 R.T. 4755, 4759];

4. Gibson's argumentative answers concerning whether he had a “conversation” or a “discussion” with Carbo [33 R.T. 4940];

5. Gibson's misleading the jury with respect to missing financial records; [Exs. Z-36, Z-37, 133; Cf. 29 R.T. 4354 and 30 R.T. 4379 with 30 R.T. 4388 and 30 R.T. 4421];

6. Gibson's denial that he knew Viola Masters as Mrs. Carbo followed by a later admission that he was introduced to her as Mrs. Carbo [32 R.T. 4661-4671];

7. Palermo's testimony that "We have been doing this for years. This is the first time this kind of case came about" [40 R.T. 5955];

8. Palermo's *explanation* for his use of fictitious names and addresses: that he was a "character" [39 R.T. 5845-5847];

9. Jordan's arrogant and insolent response to the question asking him to relate what Dragna had said to him:

"He said, 'Roses are red, violets are blue; 'Besamay kulo y alva fong ku.'" [26 R.T. 3778-3779]; and

10. Jordan's incredible refusal to admit the fact that he had testified before the Grand Jury and sworn to the exact opposite of what he testified as a witness for Palermo. [26 R.T. 3793-3808.]

For further demonstration of the quality of evidence presented by the prosecution and the absence of any real question of credibility, we respectfully direct the Court's attention to the Statement of Facts, and to the section of the Argument concerning the sufficiency of evidence, above. All of the appellants strenuously attacked the credibility of prosecution witnesses in their arguments to the jury. Leonard was described

as a liar on literally scores of occasions during final argument. But the jury rejected this attempt to blitzkrieg Leonard. Judge Tolin pointedly reminded the jury that they were the ultimate judges of credibility and he implied that he would not disturb their findings in that respect. [50 R.T. 7691-7695, 7724, 7726.]

When defendants in a criminal case decline to waive a trial by jury, they implicitly agree that they are willing to abide by the findings of fact of the twelve persons selected to sit in the jury box. When appellate courts review a criminal conviction, they seldom pause to comment upon the trial judge's denial of motions for new trial. As Judge Learned Hand stated in *United States v. Compagna*, 146 F. 2d 524, 526 (2 Cir. 1944); *cert. den.* 324 U. S. 867, *reh. den.* 325 U. S. 892 (1945):

“As is so often the case in criminal appeals, we are asked to reverse the conviction because the testimony on which the verdict was based was incredible; as always, we reply that that question is not for us, but for the jury. If, viewing the situation as a whole, they chose to believe Bioff, their conclusion was final. . . .”

Appellants further contend that Judge Tolin's medical history somehow denied them a fair trial. Despite almost four months of trial, there is nothing in the record to suggest, even remotely, that this is any more than an afterthought by appellants who now seek some advantage in the untimely death of the trial judge. As a matter of fact, Judge Tolin's health was such that he conducted a jury trial in a bank robbery case during the one week recess in this case, provided so

that counsel for appellants might prepare their defense. [*Toles v. United States*, 9 Cir. No. 17682.] We note, in passing, that appellants were not bashful about advancing any other objections or comments during the course of the trial which might memorialize alleged error in the record. Their general lack of restraint throughout the trial, and their failure to make known their concern for Judge Tolin's health during the trial demonstrates that their present suggestion that, ". . . he *may* have been unable to proceed with the required fairness and impartiality," is an argument of convenience of the most improper kind. [Gibson's Op. Br. 60. Emphasis supplied.]

## VII. CONCLUSION.

The case reveals a criminal conspiracy of vast proportions which continued to operate for an extended period of time because of the intense fear induced in the victims. Although the public at large is certainly affected by conduct of the type indulged in by the appellants, it is only when the case is viewed from the immediate victims' point of view that it's truly obnoxious and intolerable character is seen in perspective. For Leonard and Nesselth, particularly for Leonard, the period of October 23, 1958 through the trial was a period of terror during which events transpired that should be unknown under the laws of the United States.

Certain of the appellants have alleged misconduct by the appellee and during their final argument compared the prosecution to a phenomenon which might occur in a totalitarian society. [See *e.g.*, 48 R.T. 7202,



7214.] However, they are hard-put to demonstrate the truth of their slander. From any rational view of the evidence, it is apparent that every protection was afforded the appellants. It should be noted that there were no illegal wire taps, no unlawful searches and seizures, no coerced confessions, no illegal detentions, and no deprivation of the right to counsel. Nothing occurred which could in any way deny to appellants their constitutional right to a fair trial, pursuant to the due process of law.

It is characteristic of a democratic society that the judicial process proceeds deliberately in criminal matters. In an extortion case such as this, it is difficult for the Government to obtain the quality of evidence necessary to a criminal prosecution in a court of the United States. Appellee's case was presented by convincing direct and circumstantial evidence, unaided by the direct testimony of appellants' accomplices. Since extortion feeds upon fear, it is difficult to uncover even the *fact* of the crime, and witnesses who can bring its perpetrators to justice do not readily come forward. The only feature of this case which bears the mark of totalitarian methods is the crime itself: appellants' systematic use of terror to achieve monopolistic control of a national industry. In this respect, at least, the term "underworld" has pertinence and meaning for this case, since the underworld's methodology for control was exposed during this prosecution.

This is not one of those outrageous cases in which notorious defendants have been denied due process of law. Nor is there any meaningful comparison to be made between the case at bar and the Apalachin conspiracy prosecution, *United States v. Bufalino*, 285 F. 2d 408 (2 Cir. 1960), nor with *Krulwitch v. United States*, 336 U. S. 440 (1949). Appellants had an eminently fair trial. Although the record may reflect the scars of courtroom combat, the case was tried under the adversary system, and the prosecution, as well as the defense, must operate within the idiom of that system.

The trial judge took special pains to insure that appellants would not suffer from any surprise in the prosecution's conspiracy case. After appellee had rested its case-in-chief, when the Government's evidence was completely revealed to the defense, Judge Tolin gave appellants a one week recess, so that they could re-evaluate the case which they had to meet and marshal their defenses accordingly. In general, the district court allowed appellants tremendous latitude in presenting their case. Judge Boldt, the successor judge, was struck by this fact as he noted in his memorandum order of November 28, 1961. [VI C.T. 1446.]

Appellants have had their day in court and their guilt has been proved beyond any doubt pursuant to law. The proceedings have been lengthy. Nearly three years have elapsed since the return of the indictment. As a result of the unfortunate passing of Judge Tolin

after the trial had concluded, the record has been thoroughly reviewed by another experienced trial judge who found no substance in appellants' contentions of error.

In affirming the convictions of conspirators whose extortion scheme bore striking similarities to appellants', Judge Hand wrote:

" . . . The crime struck at the heart of civilized society; its very possibility is a stain upon our jurisprudence. . . ."

*United States v. Compagna*, 146 F. 2d 524, 529  
(2 Cir. 1944), *cert. den.* 324 U. S. 867,  
*reh. den.* 325 U. S. 892 (1945).

The trial was fair, the crimes were proved, and the judgments of conviction should be affirmed.

Respectfully submitted,

FRANCIS C. WHELAN,  
*United States Attorney,*

ALVIN H. GOLDSTEIN, JR.,  
*Special Assistant to the Attorney  
General,*

ROBERT E. HINERFELD,  
*Assistant United States Attorney,  
Attorneys for Appellee, United States of  
America.*

**Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT E. HINERFELD









APPENDIX A: CHRONOLOGICAL TELEPHONE RECORDS CHART — CALLS IN EVIDENCE

From					To								
	DATE	CONNECTING TIME WHERE INITIATED	DURATION		INITIATING TELEPHONE NUMBER	CITY & STATE OF INITIATING TELEPHONE	SUBSCRIBER OR BLDG. LOCATION OF INITIATING TEL. NO.	RECEIVING TELEPHONE NUMBER	CITY & STATE OF RECEIVING TELEPHONE	SUBSCRIBER OR BLDG. LOCATION OF RECEIVING TEL. NO.	EXHIBIT	ADDITIONAL TOLL SLIP DATA	REMARKS
1	10-23-58	8:32 am	1	—	DU 7-7011	L.A., Cal.	Ambassador Hotel	DI 5-2424	Reseda, Cal.	Jack Leonard	86-E	[From Rm. 5A] Truman Gibson	
2	10-23-58	— — am	1	—	DU 7-7011	L.A., Cal.	Ambassador Hotel	SE 3-5455	Chicago, Ill.	Chicago Stadium	86-D	[From Rm. 5A] Gipson	
3	10-23-58	— — am	6	—	DU 7-7011	L.A., Cal.	Ambassador Hotel	CE 6-0123	Chicago, Ill.	Bismarck Hotel	86-C	[From Rm. 5A] Gibson [to] Palermo	
4	10-24-58	2:59 pm	—	21	DU 2-9869	L.A., Cal.	Pub. Phone—Keeser Drugs	CE 6-0123	Chicago, Ill.	Bismarck Hotel	2	[From] Jack Lenard [to] Palaremo Rm. 833—Bill to HO 5-3303	See : Exs. 3, 4, 72 ; 12 R.T. 1761-1763 ; 14 R.T. 2062 ; 12 R. T. 1738-1739
5	12-17-58	12:17 pm	5	—	HO 5-3303	L.A., Cal.	Legion Stadium	FU 9-2664	Phila., Pa.	Felix Corey	10	[Sta. to Sta. Direct Distance Dialing]	
6	1- 1-59	11:12 am	4	14	HO 5-3303	L.A., Cal.	Legion Stadium	HI 9-1585	Upper Darby, Pa.	Margaret Dougherty	11	[From] Jack Leonard [to] Bodone Bill to L.A. HO 5-3303	
7	1- 2-59	8:16 am	2	42	DI 5-2424	Reseda, Cal.	Jack Leonard	JE 8-4304	Miami, Fla.	—	12	[From] Jack Leonard [to] Chris Dundee [After Ringing] JE 1-0477—Bill to L.A. HO 5-3303	
8	1- 6-59	— — pm	—	—	—	Hollywood, Fla.	Blue Mist Motel	DI 5-2424	Reseda, Cal.	Jack Leonard	107-C	[From] Tobias, Collect	
9	1-27-59	5:23 pm	5	53	HO 2-9597	L.A., Cal.	Pub. Phone—Hypure Drug Co.	FU 9-2664	Phila., Pa.	Felix Corey	13	[Sta. to Sta.] 18 Quarters, 3 Dimes, 2 Nickels	Indictment : Counts 2, 3, 6 & 7
10	2- 6-59	1:40 pm	1	55	ST 6-6038	Van Nuys, Cal.	Jack Leonard	CI 5-8100	N.Y., N.Y.	I.B.C. of N.Y.	14	[From] Jack Lenard [to] Truman Gibson Bill to HO 5-3303	
11	2-10-59	12:08 pm	4	47	SE 3-5121	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	37	[To] Leonard	
12	2-10-59	10:27 am	2	—	HO 5-3303	L.A., Cal.	Legion Stadium	SE 3-5317	Chicago, Ill.	Chicago Stadium	18	[Sta. to Sta. Direct Distance Dialing]	
13	2-12-59	3:42 pm	4	1	HO 5-3303	L.A., Cal.	Legion Stadium	UN 5-7561	Miami Beach, Fla.	Carillon Hotel	15	[To] Truman Gibson	
14	4-12-59	10:19 am	4	29	HO 5-3303	L.A., Cal.	Legion Stadium	HI 9-1585	Upper Darby, Pa.	Margaret Dougherty	16	[To] Bedone	
15	4-27-59	1:43 pm	6	8	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-1091	L.A., Cal.	Legion Stadium	45	[To] Leonard [After Ringing] HO 5-3303	
16	4-28-59	7:38 pm	6	36	FU 9-6441	Phila., Pa.	Felix Corey	HO 5-3303	L.A., Cal.	Legion Stadium	21	[To] Jack Leonard [6038 Crossed Out]	Indictment : Count 9
17	4-28-59	7:49 pm	—	30	FU 9-6441	Phila., Pa.	Felix Corey	HO 5-3303	L.A., Cal.	Legion Stadium	22	[Sta. to Sta.]	Indictment : Count 8
18	4-29-59	11:20 am	5	10	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	40	[To] Leonard [After Ringing] ST 6-6038	
19	4-29-59	1:11 pm	5	6	MA 6-8762	Phila., Pa.	—	SE 3-5121	Chicago, Ill.	Chicago Stadium	39	[To] Truman Gibson [From] Frank, Collect	

Continued on Next Page



APPENDIX A, Continued

From											To			REMARKS
DATE	CONNECTING TIME WHERE INITIATED	DURATION MINS. SECS.	INITIATING TELEPHONE NUMBER	CITY & STATE OF INITIATING TELEPHONE	SUBSCRIBER OR BLDG. LOCATION OF INITIATING TEL. NO.	RECEIVING TELEPHONE NUMBER	CITY & STATE OF RECEIVING TELEPHONE	SUBSCRIBER OR BLDG. LOCATION OF RECEIVING TEL. NO.	EXHIBIT	ADDITIONAL TOLL SLIP DATA				
20	4-29-59	12 :46 pm	1	51	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	44	[Sta. to Sta.]		
21	4-29-59	1 :47 pm	1	27	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	41	[Sta. to Sta.]		
22	4-29-59	3 :15 pm	3	40	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	42	[Sta. to Sta.]		
23	4-29-59	7 :20 pm	4	30	DA 4-5311	Phila., Pa.	————	NO 7-5978	Chicago, Ill.	Truman Gibson	23	[To] Truman Gibson [From] Palermo, Collect		
24	4-29-59	10 :58 pm	3	54	FU 9-6441	Phila., Pa.	Felix Corey	ST 6-6038	Van Nuys, Cal.	Jack Leonard	20	[To] Jack Leonard	Indictment : Count 10 See : 4 R.T. 469-474 ; 5 R.T. 682-683	
25	4-29-59	11 :05 pm	3	8	FU 9-6441	Phila., Pa.	Felix Corey	NO 7-5978	Chicago, Ill.	Truman Gibson	25	[Sta. to Sta.]		
26	4-29-59	11 :28 pm	5	27	LO 8-3937	Englewood, N.J.	William Daly	ST 6-6038	Van Nuys, Cal.	Jack Leonard	31	[To] Jackie Leonard		
27	4-29-59	11 :55 pm	3	3	FU 9-6441	Phila., Pa.	Felix Corey	NO 7-5978	Chicago, Ill.	Truman Gibson	24	[Sta. to Sta.]		
28	4-30-59	10:01 am	6	46	SE 3-5121	Chicago, Ill.	Chicago Stadium	ST 6-6038	Van Nuys, Cal.	Jack Leonard	47	[To] Leonard [From] Truman Gibson		
29	4-30-59	11 :44 am	4	10	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	43	[Sta. to Sta.]		
30	4-30-59	1 :14 pm	7	42	SE 3-5121	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	49	[Sta. to Sta.]		
31	4-30-59	3 :51 pm	16	6	SE 3-5121	Chicago, Ill.	Chicago Stadium	HO 5-1091	L.A., Cal.	Legion Stadium	48	[Sta. to Sta.]		
32	4-30-59	4 :09 pm	5	13	SE 3-5121	Chicago, Ill.	Chicago Stadium	HO 9-2951	L.A., Cal.	Legion Stadium	46	[Sta. to Sta.]		
33	5- 1-59	— —	2	—	CE 6-0123	Chicago, Ill.	Bismarck Hotel	FU 9-6441	Phila., Pa.	Felix Corey	74	[Sta. to Sta. From Rm. of Frank Palermo]		
34	5- 1-59	— —	17	—	CE 6-0123	Chicago, Ill.	Bismarck Hotel	RI 8-4009	L.A., Cal.	Olympic Auditorium	75	[From Frank Palermo's Rm. to] Parnasols		
35	5- 1-59	— —	3	—	CE 6-0123	Chicago, Ill.	Bismarck Hotel	HO 5-3303	L.A., Cal.	Legion Stadium	76	[Sta. to Sta. From Rm. of Frank Palermo]		
36	5- 3-59	1 :30 pm	19	4	HO 5-3303	L.A., Cal.	Legion Stadium	NO 7-5978	Chicago, Ill.	Truman Gibson	17	[To] Truman Gibson		
37	5- 5-59	12 :06 am	12	30	NO 7-5978	Chicago, Ill.	Truman Gibson	CR 4-7777	B.H., Cal.	Beverly Hilton Hotel	34	[To] Geo. Tobias, Rm. 663 Beverly Hilton Hotel		
												Rm. Tele Da by Opr. 323 WH 05 Opr. 761		
38	5-11-59	1 :42 am	10	—	LO 8-3937	Englewood, N.J.	William Daly	HI 9-1585	Upper Darby, Pa.	Margaret Dougherty	30	[Sta. to Sta. Direct Distance Dialing]		

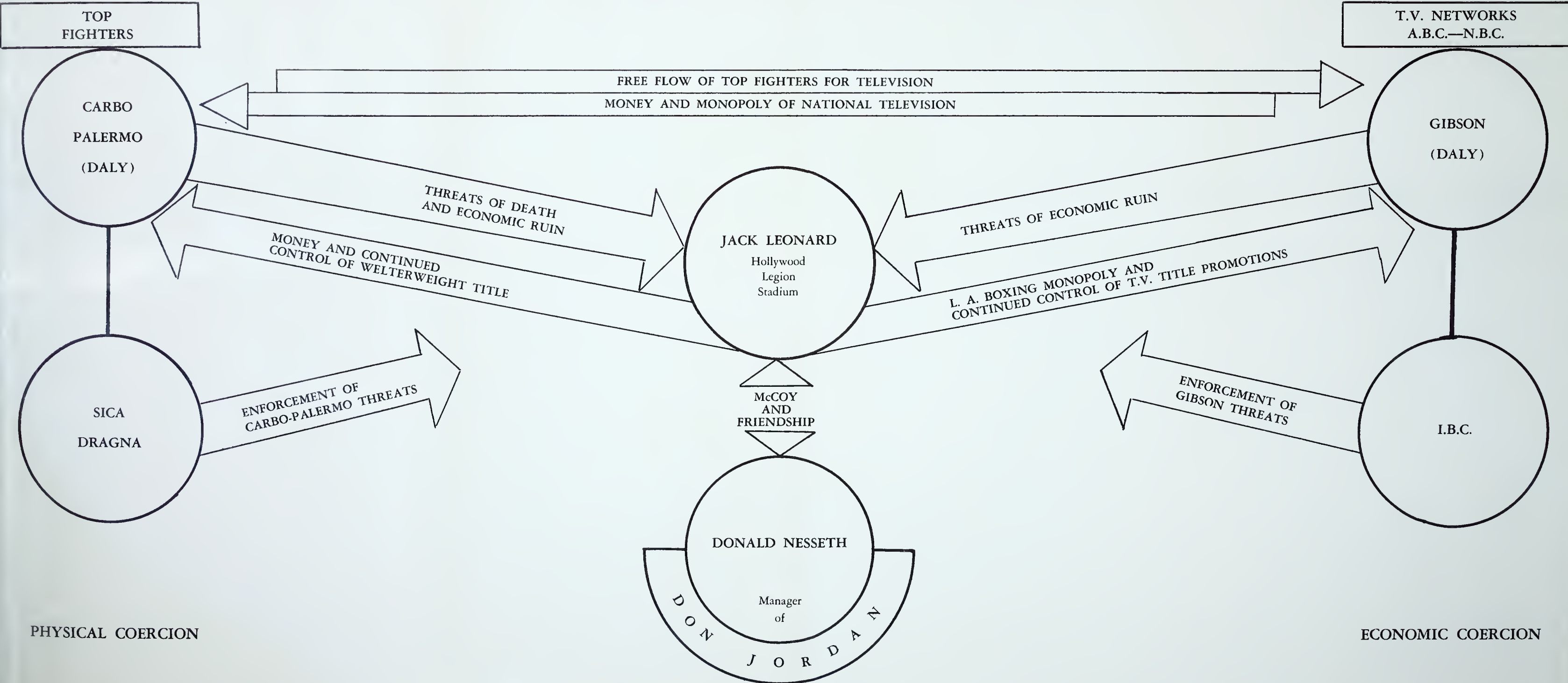








APPENDIX B: SCHEMATIC REPRESENTATION OF THE CONSPIRACY











## APPENDIX C.

### Judge Boldt's Order Denying Supplemental Motions for New Trial.

"On May 30, 1961, defendants were found guilty by jury verdict of all counts charged against each defendant respectively in a ten-count indictment. Following return of the verdict the late Honorable Ernest A. Tolin, judge of the above-entitled court who presided throughout the trial of the case, denied the motions for judgment of acquittal of defendants Carbo, Palermo, Sica and Gibson. The motion for acquittal of defendant Dragna was taken under submission. Time was allowed and specified for the service and filing of supporting and opposing memoranda on motions of all defendants for new trial. At the time of Judge Tolin's death on June 11, 1961, sentence had not been imposed on any defendant, and ruling had not been made on the Dragna motion for acquittal, a written acquittal motion of defendant Gibson or on any of the new trial motions.

"On June 26, 1961, by order of Chief Judge Hall pursuant to Fed. Crim. Rule 25, this cause was assigned to the undersigned as successor judge for the conduct of all further proceedings herein. All defendants filed supplemental motions for new trial on the asserted ground that judicial duties in the case cannot be performed properly by a successor judge.

"The cited rule provides that if a successor judge be satisfied he cannot perform the duties to be performed by the court after verdict because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial. Specific determina-

tion of that matter by a successor judge prior to and separate from decision on other pending motions is indicated by the language of the rule and the nature of the question presented. The supplemental motions have now been fully considered on the memoranda and oral argument submitted to the undersigned and on the entire record, including the 7,500 page transcript of the evidence and trial proceedings.

“The supplemental motions are principally based on the contention that because a successor judge was not present at the trial he cannot acquire ‘the feel of the case’ sufficiently to understand and exercise sound discretion in various matters including appraisal of the credibility of the evidence supporting the verdict. In order to fully and fairly consider this contention an extensive and detailed study has been made of all testimony and proceedings in the case. A complete and detailed abstract thereof has been prepared which, when typed in final form, will be filed as an appendix to this order.

“The record clearly shows that the able and experienced trial judge conducted the entire proceedings with remarkable patience and restraint, giving fair and thoughtful attention to the frequent and numerous objections and contentions presented by veteran and vigorous counsel. From a review of the entire record it appears to my complete satisfaction that all judicial duties and functions subsequent to verdict, including evaluation of the evidence for all necessary purposes, can and should be performed by a successor judge. To do so will require much time, effort and concern. Such considerations, however, will not justify evasion

of judicial duty by the simple and easy solution of granting a new trial. After extensive consideration of the matter I have reached the firm conclusion and conviction that a successor judge, within the limits of his character, ability and experience, can decide all undetermined issues in the case without impairment in any respect or degree of the lawful rights of any defendant. Accordingly, without prejudice to or ruling on any other contention asserted in any other pending motion, it is hereby

“ORDERED that each and all of the defendants’ supplemental motions for new trial be and the same hereby are denied. Exception allowed to each defendant.

“Dated this 13th day of October, 1961.

Geo. H. Boldt

United States District Judge”

[VI C.T. 1342-1344.]









## APPENDIX D.

### Judge Boldt's Memorandum Order.

"Jury trial of this case from February 21 to May 30, 1961 was conducted by the late Judge Ernest Tolin. On the latter date a verdict was returned finding each of the five defendants guilty as charged in the ten count indictment. Eight counts charged substantive violations of 18 U. S. C. 875(b) and 1951 and two counts charged conspiracies to violate the cited sections. Each defendant was separately represented by one or more trial counsel. A total of 77 witnesses testified, almost all being interrogated by each of the attorneys and several were examined in great detail. 359 exhibits were marked and 264 admitted in evidence, including several recordings. The transcript of trial proceedings runs to about 7,500 pages.

"Frequently during the course of every trial session multiple objections were presented by counsel for each defendant and often objections were accompanied or followed by motions for mistrial. Voluble and vigorous objections and exceptions were made to nearly every procedure and incident of the trial. Largely at the instance of defendants' counsel, perhaps unavoidably, the evidence contains much repetition and extended inquiry into the details of transactions and events of only incidental relationship to the offenses charged. Defendants' counsel were allowed a wide latitude in cross-examination of witnesses called both by the government and by co-defendants, and the privilege was fully exercised.

"Oral and written motions for acquittal and for new trial presenting numerous and extended contentions were submitted by each defendant. Judge Tolin died

June 11, 1961, and on June 26, 1961 the undersigned was designated as successor judge pursuant to Rule 25. Each of the defendants filed supplemental motions for new trial raising the contention that a successor judge could not properly discharge judicial duties in the case. After extensive consideration thereof the supplemental motions were denied by an order dated October 13, 1961. At the time of entry of that order a 2,000 page rough draft of the abstract referred to in the order was completed. Further condensing and typing of the abstract in final form for filing has been unavoidably delayed but will be completed shortly.

“Examination of the voluminous record with relation to each of the numerous questions presented has required a great amount of time, study and effort. Even brief discussion of all of the contentions advanced by defendants would require an extremely lengthy memorandum. Full discussion of any of the contentions would necessarily require extended statement. The value, if any, of such dissertation by this court does not seem to warrant the time and effort involved in its preparation, or to justify further delay in decision. Three of the defendants are in custody and early disposition of all pending matters is important to all concerned. The abstract of record to be filed as an appendix to this order and that of October 13, 1961 has greatly facilitated close and careful scrutiny of each and every point raised by each defendant. Each asserted error has been fully considered and checked against the record in the light of the pertinent authorities.

“On the whole record this court is fully satisfied every defendant was accorded a fair trial, free from



prejudicial error, and that the evidence thoroughly supports the verdict in every essential particular as to each defendant. The contentions of defendants which entailed the most exhaustive consideration of the record and analysis of authority are those relating to the credibility of government witnesses, the admission in evidence of the recordings and their playing to the jury. The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseseth or both. Their testimony, in all essential particulars was fully and convincingly corroborated. Nor is there any doubt as to the admissibility of the recordings and of the propriety of their being played under the circumstances shown by the record. This court is now fully satisfied there is no substantial merit in the contentions referred to which would support a finding of prejudicial error. However, if counsel for the government or for any defendant desire to offer any further argument or statement, oral or written, on the contentions specified, such may be submitted at or before a hearing in open court which is hereby set for Saturday, December 2, 1961, commencing at 10:00 a.m.

“All defendants and their counsel are hereby directed to be present at the time stated. Sentences will be imposed at that time in the event defendants’ motions are finally denied at that hearing.

“Dated this 28th day of November, 1961.

George H. Boldt,

United States District Judge”

[VI C.T. 1446-1448.]







## APPENDIX E.

### The Portions of Judge Tolin's Charge to the Jury Concerning Reputation Evidence.

"There is another thing which is just a little bit out of the perfectly reasoned symmetry of the law, a rule regarding reputation. You will recall that reputation and character are very different. Character is what a person is. Many times people with fine traits of character go through life without those fine traits being fully displayed to others because of the difficulty of communication, or sometimes timidity, sometimes one thing or other.

"But reputation is what does the community think of a person. Now, reputation evidence has great value in certain types of cases. Suppose that some one of the great outstanding characters of the business, political or educational, clerical field were discovered in an incriminating situation or what appeared to casual observation to be an incriminating situation. Suppose that some excited victim of a robbery said, 'Yes, that is him. That is him,' and found out it wasn't. Suppose that this person were exceedingly substantial. Let's take, just for illustration, a person to whom this would be most unlikely to happen, say, the Governor of New York. While a governor was apprehended one time near the scene of a robbery and was accused of it, it would be very, very unlikely that a person of the reputation of that man would be out as a stick-up man.

"Once you have a principle in law it applies to everyone, and this is not to say that it should not be applied in this case or that it should not be applied very carefully



and sympathetically in this case. But evidence of the reputation of a witness should be examined very carefully, bearing in mind that it is reputation.

“In this case the reputation as to Mr. Leonard as a witness is somewhat conflicting. You should look to see to what extent he is corroborated by other circumstances, and if you are going to make any determination as to what his reputation is or has been consider all of the evidence on the point.

“Now, as to defendants as defendants, not as witnesses, a defendant may become a witness or not as he chooses. But as defendants, the reputation of a defendant can only be put in evidence if that defendant elects to put it in evidence. He exercises the election by calling a witness who testifies to his good reputation.

“In this case we have the conflict of problems that arises from that in the case of Defendant Gibson. As I recall it, the defendant Gibson was the only one who put his reputation in evidence. He called witnesses and they were asked questions, ‘Is his reputation good or bad?’ And they said it was good.

“That is offered as to someone under the same principle I mentioned regarding the Governor of New York. Mr. Gibson, of course, doesn’t claim to be a governor of any political subdivision. He claims to be an active managing head of substantial commercial interests. He claims to be a member of the bar, and he claims to have a good reputation. This is not to say that people of good reputation are entitled to go and commit crimes. No one is entitled to commit crimes. But there might be instances, as in that possibly now

getting about to the limit of its usefulness in instructions, that case we mentioned as to the Governor of New York being charged with robbery.

“The jury is entitled to consider whether a person having such a reputation would commit such an offense. It is all up to you and you are to integrate all of this evidence. You are to integrate all of these instructions. Take nothing as an isolated matter. Consider the picture as a whole.

“No other evidence of what the reputation of a defendant in this case is has been put before you. Formulas of the law would not permit it, except in this one instance, and then it was somewhat fragmentary, as I will point out to you.

“The witness Leonard said that he understood that certain persons had underworld reputations. The Indictment charges that the conspirators would use persons of underworld reputations in order to frighten Leonard, and it becomes important to know whether Leonard so considered people who were, as he put it, undertaking to frighten him.

“Now, you will have to consider whether it was the intent of the defendants, and if so, has it been evidenced here by either circumstantial or direct evidence, to use people with that type of a reputation.

“You will have to consider whether Leonard or Neseth were people who would be apt to be influenced by people of such a reputation. Influenced, and if so, in what way? Then you will have to consider was he so influenced.

“But so far as the reputation of any defendant is concerned, the only evidence here on what the reputa-

tion actually was of any defendant is that Gibson has offered evidence that his reputation was good. Insofar as I can recall, strictly in the field of reputation evidence, that is, someone getting on the stand and saying, 'I know what his reputation is', there was no evidence to the contrary.

"But bear in mind that reputation evidence does have a very limited purpose in the trial." [50 R.T. p. 7695, line 23, to p. 7699, line 15.]

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"Mr. Bradley: On behalf of Dragna, the court please, first of all, I think the comment you made in regard to reputation has not pointed out to the jury that the testimony of Leonard in regard to the alleged reputation of Dragna was admitted solely for the purpose of showing his state of mind. I think this results partially—

"The Court: All right. That is enough.

"(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

"The Court: The evidence of Leonard regarding the reputation of certain defendants was admitted into evidence and shall be considered by you only as showing or as evidence upon the subject of what Leonard's state of mind was concerning those defendants.

"There has been no independent testimony regarding the reputations of those defendants. Reputation, as you know, is what the community thinks a person is. What the character of those defendants might be you may assess from all of the evidence in the case which might bear upon that subject.

“(Whereupon, the following proceedings were had at the bench, out of the hearing of the jury, with all counsel and defendants present:)

“Mr. Goldstein: During the course of your main charge and this time, as well, you referred to Leonard’s testimony. Nesseth also testified with regard to his understanding of his reputation.

“(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

“The Court: That comment applies also to Mr. Nesseth.” [50 R.T. p. 7705, line 18, to p. 7708, line 3.]









## APPENDIX F.

### Judge Tolin's Instructions (During the Presentation of Evidence and in His Charge to the Jury Before They Retired to Deliberate) Concerning Proof of Membership in a Conspiracy and Declarations by Co-Conspirators.

"I will tell the jury that, of course, when any one of a group of conspirators makes a statement in furtherance of the purpose of the conspiracy, that is binding on all the co-conspirators. But that rule only applies if there are co-conspirators.

"Now, before you can hold any one of these defendants to be bound by this conversation with Mr. Palermo, if you believe there was such a conversation, it would be necessary for you to find from other evidence that such person, as to whom you are making applicable that conversation, was in fact a conspirator." [12 R.T. 1664, line 20 to 1665, line 5.]

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"The Court: Members of the jury:

"It has been agreed that this recording is to be played with the major obscenities edited out. Now, I should tell you that none of these defendants now before the court said any of the obscene words, or it is not plain that they did, and they weren't even there. That perhaps brings to you the question of why do we hear it? In the indictment in this case, it is charged that although Daly was a co-conspirator, that is, a person that could have been indicted along with the rest but for some reason wasn't, and under the law, if he really was a co-conspirator, but not otherwise, any statements that he made or acts that he did

which were contemplated by him to be in aid of accomplishing the purpose of the conspiracy are binding upon any other person or persons who were at that time conspirators. In other words, if you have a conspiracy, you have two or more persons who are undertaking to accomplish some criminal purpose by joint action, and if Mr. Daly was one of those persons, then you are entitled to know what he did, what he said toward attempting to effectuate the purpose of the conspiracy. Now, it is a contention that he was a member of the conspiracy and it is a contention that each of these defendants was a member of the conspiracy, but, each defendant still remains a case to himself, you have to judge each one personally and you have to determine whether Mr. Daly was a member of the conspiracy. That you can't do until you get to the deliberations in the jury room.

“But, on the basis that there has been some evidence which might be interpreted to the effect that Daly was a conspirator and some evidence which might be interpreted that one or more of these defendants on trial was a conspirator and evidence which might be interpreted that Daly was acting on behalf of the conspirators as a group, it makes the playing of this record a proper thing to do in the case.

“Now, I think there is another thing you should bear in mind as you hear the recording. I don't know just how it would shape up on analysis, because you are the ones who are to analyze, because you are the only ones who are to judge the evidence, but, bear in mind as you consider this recording that one party to it, that is, Mr. Leonard knew it was

being recorded; the other party to it, Mr. Daly, didn't. Mr. Leonard went to the conversation having been equipped, according to the evidence here, with the device by which the recording was made, but it was secreted upon his person, so the other party to the conversation, Mr. Daly, didn't know it was being recorded. You should, therefore, when you consider this, bear in mind that that situation existed and the various inferences which can be drawn from it will be pointed out to you when the case is argued. I am sorry, but we have a long way to go in this case yet." [17 R.T. 2510, line 22 to 2512, line 21.]

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". . . It is a rule of the law of conspiracy that whenever any one of the conspirators does an act, has a conversation or takes some action for the purpose of furthering the objectives of the conspiracy, that it is the act of all; just as in a partnership, it is the act of all. Now, it is an issue in the case: Was there a conspiracy? I am not saying that it has been proved that there was. That is for the jury to say when they get the case, after all the evidence is in, but at this stage of the trial, under the rules that I have announced, this question is proper and should be answered. So the objection is overruled." [37 R.T. 5508, line 4 to line 15.]

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"The Court: Now, members of the jury, there have been objections to some of this on behalf of some of the defendants other than Palermo, and I refer to these questions about conversations with Captain Hamilton. You should bear in mind that if there be a conspiracy and it be proved, that whatever one con-



spirator says, in order for it to be held against any other conspirator, must have been spoken or the act done for the purpose of aiding in the conspiracy, and if it was said or spoken for any other purpose it is not evidence against anyone except the person who said it.” [42 R.T. 6218, line 6 to line 15.]

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“Early in the trial I read to you for your general orientation the instructions on conspiracy that used to be given by Judge James. Judge James wrote a lot of suggested instructions, or instructions which had been useful to him in his law career on this bench, and they were finally printed up because he is one of the old patriarchs of this court. He has been dead now some twenty years, but the law that he expounded in his instructions is considered definitive. So I took his general instructions on conspiracy and read them to you. I will read them to you again now.

“Everything I have said about the law of conspiracy is, of course, to be integrated with these instructions. In fact, juries should be told, and I do now tell you, you do not single out any particular instruction and take it out of context. The instructions are to be considered in their entirety. Consider the whole thing.

“Now to Judge James’ instructions on conspiracy:

“The law under which the indictment in this case is drawn provides that if two or more persons conspire to commit any offense against the United States, and one or more of them does any act to effect the object of the conspiracy, each of the parties to such conspiracy is guilty.’” [50 R.T. 7650, line 23 to 7651, line 20.]

“Now I am coming back to Judge James:

‘In order to establish the crime charged, it is necessary, first, that the conspiracy or agreement to commit the particular offense against the United States as alleged in the indictment be established, and secondly, to prove further that one or more of the parties engaging in the conspiracy has committed some act to effect the object thereof.

‘To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful venture or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before the defendants may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed as alleged in the in-

dictment, and that the defendants were active parties thereto.

‘In order to warrant you in finding a verdict of guilty against the defendants, or any of them, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the indictment was entered into between two or more of the defendants to violate the law of the United States in the manner described in the indictment. It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid.

‘Under the charge made the conspiracy constitutes the offense and it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such. The mere fact that either or any of the defendants named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out.

‘Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

‘Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by

any of the conspirators may be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

‘The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants or either of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly.

‘It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if any of the defendants, with knowledge that it was the design that the law be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty.’



“Judge James wrote those instructions back in the days when the juries in this court were all male, so I referred to ‘reasonable men’, and so on. But, of course, it could have been transposed to read ‘reasonable jurors’, because our jury today is principally female.” [50 R.T. 7652, line 16 to 7657, line 23. A portion of Judge James’ form instructions on the law of conspiracy were first read to the jury during appellee’s case-in-chief: 11 R.T. 1627-1630.]

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“However, that does bring to mind I overlooked giving verbatim two of Mr. Ming’s I told him I would give.

“Mr. Ming: I was about to call attention to that.

“The Court: You stay here. I am going over by the microphone. My voice is kind of tired. We have had almost two hours of this.

“(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

“The Court: I overlooked a few, but they are not particularly extended.

‘The question of the guilt or innocence of any defendant must be determined from the evidence which relates to him and must not be controlled or affected by testimony which relates only to other defendants.’

“Now, in this regard you will recall that there is a principle that if a conspiracy actually exists, after it has come into being, that anything said by any one of the co-conspirators, if said for the purpose of furthering the conspiracy, is evidence against all.

“That, of course, I reaffirm, but I do not mean to re-emphasize it, but when I gave it to you before this morning I omitted by inadvertence the other statement given today, and to put it in context I repeat it.

‘You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy.’

“You probably realize, and you are now told Mr. Gibson is a defendant in only the conspiracy counts.”  
[50 R.T. 7713, line 15 to 7715, line 5.]

\* \* \* \* \*

“(Whereupon, from 12:02 o’clock p.m. to 12:03 o’clock p.m., the following proceedings were had at the bench, out of the hearing of the jury, with all counsel and defendants present:)

“Mr. Bradley: If the court please, I would like to advise the court that the same situation pertains in regard to Mr. Dragna as it does with regard to Mr. Gibson. Mr. Dragna is accused in only Count One and Count Five. You have now left the impression that only Mr. Gibson is involved in those two counts.

“The Court: No, I don’t think I left that.

“Mr. Strong: The same as to Palermo.

“The Court: If you think so, I will clarify it.

“(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

“The Court: The defendant Dragna is also concerned in only Counts One and Five.

“(Whereupon, from 12:05 o'clock p.m. to 12:08 o'clock p.m., the following proceedings were had at the bench, out of the hearing of the jury, with all counsel and defendants present:)

“Mr. Strong: In giving the instruction with relation to Mr. Gibson and using his name, actually they apply also to the defendant Palermo.

“Mr. Beirne: All of the defendants. The declarations of the acts of a co-conspirator can't be used to establish a conspiracy. It must be proved by independent evidence. Membership in a conspiracy cannot be proved by declarations, [sic] that must be proved by independent evidence.

“The Court: I think it is covered adequately by the James instructions.

“Mr. Beirne: I don't think your Honor mentioned it. I may be mistaken.

“The Court: What about it, Mr. Goldstein?

“Mr. Goldstein: I think you gave a full instruction on that subject.

“The Court: I think it was quite adequate, and it has been worked out pretty fully. Your exception is noted.” [50 R.T. 7717, line 1 to 7719, line 21.]

\* \* \* \* \*

“The Court: Whenever during the trial I advised that certain evidence was limited to a certain purpose or party, bear in mind that it shall be so limited.” [50 R.T. 7728, lines 3-5.]

